compliance and actions for damages shall be in accordance with the applicable provisions of [Chapter 93A, §§ 4–10].” Id. § 32L(7).

Viewed together, these provisions of Chapter 140, §32L create a comprehensive structure to protect tenant rights. Subsection two creates a substantive legal standard against which to judge non-uniformity in rent, subsection six renders unenforceable any rules that violate subsection two, and subsection seven authorizes a cause of action to enforce the foregoing legal rights. Plainly, these provisions vest MHC tenants with substantive rights, which, in certain circumstances, afford them protection from non-uniform rent structures.

That the right is not unqualified—because its presumption of unfairness is rebuttable—does not make it any less of a right. Indeed, the bedrock constitutional right against government searches of private homes is itself not unqualified because it is limited only to prohibiting “unreasonable” searches, yet it is undoubtedly a right. See U.S. Const. amend. IV. Moreover, that the plaintiffs in Blake successfully challenged a non-uniform rent structure as a violation of § 32L(2) through Chapter 93A demonstrates that, in passing § 32L(2), the Legislature created a right. See Blake, 158 N.E.3d at 33.

Under Article 89, § 7(5) of the Constitution of the Commonwealth, cities and towns do not have the authority “to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power . . .”. Mass. Const. art. 89, § 7(5). Consequently, Middleborough does not have the authority to modify or impair the substantive rights afforded by § 32L(2). Nor does the text of the enabling act of the Middleborough Rent Control Board—the Special Act of 1985—authorize Middleborough to step in and administer those rights.

Lastly, Defendants' interpretation proves too much. Under Defendants' theory, a rent control board concededly lacking the authority to enforce § 32L(2) could pass MHC regulations separating similar tenants into different rent classes without sufficient justification in contravention of § 32L(2) and, in doing so, could effectively (1) insulate the MHC owner from a Chapter 93A action challenging the rent structure and (2) preclude all future MHC tenants from challenging the legality of the rent structure under Chapter 93A. The Court rejects an interpretation resulting in such an outcome.[5] Such an interpretation would preclude judicial review, disregarding long-standing authority that the "duty of statutory interpretation rests ultimately with the courts." Blake, 158 N.E.3d at 26 (citations omitted, emphasis added).[6]

Of course, municipal rent control regulations are not irrelevant to the § 32L(2) analysis. To the contrary, the SJC has held that rent control boards must consider § 32L(2). Chelmsford Trailer Park, Inc., 469 N.E.2d at 1264. Various provisions of the AG's regulations reference and, in some sense, defer to municipal rent control determinations. See 940 Code Mass. Regs. 10.02(7), 10.02(8)(c) (1996). Rent control in Middleborough, as set forth in the Special Act of 1985, is meant to protect tenants and assure a reasonable income for the owner, objectives that are not dissimilar to those of the MHA. Blake, 158 N.E.3d at 30. The Middleborough Rules are

[5] A simple example building on Blake illustrates this point. Suppose a town with a rent control board enacted an MHC regulation authorizing a ninety-six dollar per month increase for all new tenants and, in response, an MHC operator implemented that rent structure. While current tenants could avail themselves of a Chapter 30A appeal of those regulations, they likely would have no reason to do so as their rent remained unchanged. Future tenants—the people who would be subject to the increase upon moving to the MHC—would likely lack both the standing and the interest to file an appeal at the time the regulations were adopted. If, after moving to the MHC, those tenants decided to challenge the non-uniform rent structure as a violation of § 32L(2), Defendants' interpretation would require a court to dismiss those claims without reaching the merits because the rent structure was compliant with the regulations and, thus, exempt under § 3.

[6] To be sure, the Court is not saying that Defendants have failed—or succeeded—to rebut the presumption of unfairness outlined in § 32L(2). At present, the Court only holds that the exemption does not apply.

certainly relevant—possibly even quite weighty—to the issues presented in this suit, but as a matter of law, they do not exempt Defendants from liability nor do they insulate the Oak Point rent structure from judicial review.

For these reasons, Defendants' Motion for Judgment on the Pleadings is DENIED. Turning to the Plaintiffs' Cross-Motion, the Court notes that even when viewing the matter under the defendant-friendly standard, the resolution of the issues remains the same.[7] Therefore, the Court ALLOWS Plaintiffs' cross-motion.

III. CONCLUSION

For the foregoing reasons, Defendants are not entitled to a § 3 exemption. At present, the Court makes no determination as to whether the rebuttable presumption under § 32L(2) has been met. Accordingly, Defendants' Motion for Partial Judgment on the Pleadings (Doc. No. 78) is DENIED, and Plaintiffs' Cross-Motion for Judgment on the Pleadings (Doc. No. 88)—striking Defendants' Fourth, Seventeenth, and Eighteenth Additional Defenses—is ALLOWED.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

[7] The Court notes that no party has suggested that the resolution of either motion turns on in whose favor the Court draws inferences. Such is the case especially given that the dispositive questions are legal in nature.

Applicant Details

First Name	**Ethan**
Last Name	**Syster**
Citizenship Status	**U. S. Citizen**
Email Address	**ethansyster@law.gwu.edu**
Address	**Address** Street **500 23rd St. NW Apt. B406** City **Washington** State/Territory **District of Columbia** Zip **20037** Country **United States**
Contact Phone Number	**9106856559**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2021**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Arnold & Porter Government Contracts Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Smith, Peter
pjsmith@law.gwu.edu
(301) 907-4392
Cronin, Katya
katya_cronin@law.gwu.edu
Sullivan, Marian
marian.sullivan@cbca.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ETHAN SYSTER
500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

June 7, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-2025 term. I am enclosing a resume, law school transcript, and a writing sample. Also enclosed are letters of recommendation from Professor Peter Smith, Professor Katya Cronin, and Board Judge Marian Sullivan. I would be happy to provide additional information, including additional references, upon request. Thank you for your consideration.

Sincerely,

Ethan Syster

ETHAN SYSTER
500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

EDUCATION

The George Washington University Law School — Washington, D.C.
J.D., expected — May 2024
Honors: George Washington Scholar (Top 1%-15% of class to date); GPA: 3.979
Journal: *The George Washington Law Review*, Articles Editor
Activities: Research Assistant to Professor Peter Raven-Hansen (Spring 2023);
Arnold & Porter Government Contracts Moot Court (2023 Winner, 2024 Co-Chair);
Writing Fellow (2022-2023);
Government Contracts Student Association (President 2023-2024);
Alternative Dispute Resolution Board (Social Co-Chair 2022-2023)

The University of North Carolina at Chapel Hill — Chapel Hill, NC
B.A., *summa cum laude*, in Political Science and Economics — May 2021
Leadership: Honor System Outreach (Managing Editor);
Epsilon Tau Pi (Eagle Scout Service Fraternity) (Secretary)
Activities: Undergraduate Student Attorney General's Office; Carolina Union Activities Board

EXPERIENCE

The George Washington University Law School — Washington, D.C.
Student-Attorney for Civil Access to Justice Clinic, Family Law Division — (Upcoming) Fall 2023

Covington & Burling, LLP — Washington, D.C.
Summer Associate — May 2023 – Present

- Research legal issues including pro bono criminal matters, antitrust, and procurement law.
- Draft memoranda communicating research to supervising attorneys.
- Collaborate with attorneys and staff to research solutions to novel legal issues.

U.S. Court of Federal Claims — Washington, D.C.
Judicial Intern, Chambers of the Honorable David A. Tapp — January – April 2023

- Researched legal issues including takings law, administrative law, and procedural issues.
- Communicated legal research and analysis to clerks and the judge through legal memoranda.
- Edited and proofread judicial opinions, orders, and other communications.

U.S. Civilian Board of Contract Appeals — Washington, D.C.
Student Law Clerk — September – November 2022

- Researched legal issues including government contracts changes, delays, and terminations.
- Drafted memoranda assisting board judges in preparing for hearings and arbitrations.
- Worked collaboratively with clerks, board judges, and other staff to draft orders and opinions.

U.S. Department of Homeland Security, TSA, Office of the Chief Counsel — Washington, D.C.
Legal Intern (Acquisitions, Property, and Other Transactions) — May – July 2022

- Researched procurement law matters, including contract formation and administration issues.
- Wrote memoranda to communicate legal research and analysis to supervising attorneys.

INTERESTS

- Volunteering with the Boy Scouts of America (Eagle Scout).
- Volunteering with the Washington Lawyers' Committee Workers' Rights Clinic.
- Hiking the Appalachian Trail; Listening to true crime podcasts.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G20359237
Date of Birth: 12-APR

Date Issued: 05-JUN-2023

Record of: Ethan Syster

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: ETHAN SYSTER
ETHANSYSTER@GWU.EDU

REFNUM:5607270

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Morant	4.00	B+
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Smith	4.00	A+
LAW 6216	Fundamentals Of Lawyering I Cronin	3.00	A
Ehrs 15.00	GPA-Hrs 15.00	GPA 3.911	
CUM 15.00	GPA-Hrs 15.00	GPA 3.911	
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2022			
	Law School		
	Law		
LAW 6208	Property Roberts	4.00	A-
LAW 6209	Legislation And Regulation Smith	3.00	A
LAW 6210	Criminal Law Cottrol	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	A
LAW 6217	Fundamentals Of Lawyering II Cronin	3.00	A-
Ehrs 16.00	GPA-Hrs 16.00	GPA 3.854	
CUM 31.00	GPA-Hrs 31.00	GPA 3.882	
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
	Law School		
	Law		
LAW 6402	Antitrust Law Kovacic	3.00	A+
LAW 6502	Formation-Government Contracts Papson	3.00	A+
LAW 6666	Research And Writing Fellow Blinkova	2.00	CR
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Ortiz	2.00	A
Ehrs 13.00	GPA-Hrs 8.00	GPA 4.250	
CUM 44.00	GPA-Hrs 39.00	GPA 3.957	
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2023			
LAW 6218	Professional Responslbty/Ethic	2.00	A+
LAW 6400	Administrative Law	3.00	A-
LAW 6503	Performance Of Govt Contracts	3.00	A+
LAW 6515	Govt Contracts Moot Court	2.00	CR
LAW 6666	Research And Writing Fellow	2.00	CR
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	2.00	CR
Ehrs 14.00	GPA-Hrs 8.00	GPA 4.083	
CUM 58.00	GPA-Hrs 47.00	GPA 3.979	
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2022			
	Law School		
	Law		
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G20359237
Date of Birth: 12-APR

Date Issued: 05-JUN-2023

Record of: Ethan Syster

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6230	Evidence	3.00	----------
LAW 6250	Corporations	4.00	----------
LAW 6419	Campaign Finance Law	2.00	----------
LAW 6506	Govt Contracts Cost&Pricing On	2.00	----------
LAW 6658	Law Review	1.00	----------
LAW 6711	Civil Access To Justice Clinic	2.00	----------
	Credits In Progress:	14.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	58.00	47.00	187.00	3.979
OVERALL	58.00	47.00	187.00	3.979

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

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Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

University Registrar

RAISED SEAL NOT REQUIRED

Name: Syster,Ethan
Student ID: 730308607

Birthdate: 04/12/2001
Print Date: 05/04/2023

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 05/16/2021
Major: College of Arts and Sciences
Political Science

Second Major: Economics (BA)

Transfer Credits

Transfer Credit from Univ North Carolina Wilmington
Applied Toward AS Bachelor

	Earned
Transfer Totals:	54.000

Test Credits

Test Credits Applied Toward AS Bachelor

2019 Fall

Course		Description	Earned
MATH	110P	ALGEBRA	0.000
MATH	129P	PRECALCULUS MATHEMATICS	0.000
		Test Transfer Totals:	0.000

Academic Program History

Program:	AS Bachelor	
04/22/2019:	Active in Program	
	04/22/2019:	College of Arts and Sciences Business Administration Major
Program:	AS Bachelor	
11/04/2019:	Active in Program	
	11/04/2019:	College of Arts and Sciences Political Science Major
	11/04/2019:	Economics (BA) Second Major
Program:	AS Bachelor of Arts	
08/10/2020:	Active in Program	
	08/10/2020:	College of Arts and Sciences Political Science Major
	08/10/2020:	Economics (BA) Second Major

Beginning of Undergraduate Record

2019 Fall

Course		Description	Attempted	Earned	Grade	Points
ARTH	155	AFRICAN ART SURVEY	3.000	3.000	A	12.000
ECON	101	ECON: INTRO	3.000	3.000	A	12.000
LFIT	140	LIFETIME FITNESS: ULT FRISBEE	1.000	1.000	A	4.000
PHIL	220	17TH-18TH C WESTERN PHILOSOPHY	3.000	3.000	A	12.000
POLI	234	COMP POLI OF GLOBAL SOUTH	3.000	3.000	A-	11.100
POLI	67	FYS DESIGNING DEMOCRACY	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.944	Term Totals	16.000	16.000	16.000	63.100
		Transfer Totals		54.000		
Cumulative GPA	3.944	Cum Totals	16.000	70.000	16.000	63.100

Term Honor: Dean's List

Academic Standing Effective 12/13/2019: Good Standing

2020 Spring

Course		Description	Attempted	Earned	Grade	Points
BUSI	102	FINANCIAL ACCOUNTING	1.500	1.500	A	6.000
ECON	400	STATISTICS AND ECONOMETRICS	3.000	3.000	A	12.000
ECON	410	MICRO THEORY	3.000	3.000	A	12.000
POLI	208	POLIT PART & ELECT	3.000	3.000	A	12.000
POLI	431	AFRICAN POLI AND SOC	3.000	3.000	A	12.000
POLI	432	COMPARATIVE TOLERANCE	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.500	16.500	16.500	66.000
Cumulative GPA	3.972	Cum Totals	32.500	86.500	32.500	129.100

In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill implemented an emergency grading accommodation in the Spring 2020 that allowed for grades of pass/fail.
In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill suspended the Dean's list in the Spring 2020 semester.

Academic Standing Effective 05/05/2020: Good Standing

2020 Fall

Course		Description	Attempted	Earned	Grade	Points
ECON	420	IN TH/MONEY INC EMP	3.000	3.000	B	9.000
ECON	470	ECONOMETRICS	3.000	3.000	B+	9.900
ECON	490	SPECIAL TOPICS	3.000	3.000	A	12.000
POLI	271	MOD POL THOUGHT	3.000	3.000	A	12.000
POLI	476	POLITICAL THEORY OF THE AM	3.000	3.000	A	12.000

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

University Registrar

RAISED SEAL NOT REQUIRED

Name: Syster,Ethan
Student ID: 730308607

			Attempted	Earned	GPA Units	Points
Term GPA	3.660	Term Totals	15.000	15.000	15.000	54.900
Cumulative GPA	3.874	Cum Totals	47.500	101.500	47.500	184.000

In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill implemented an emergency grading accommodation in the Fall 2020 that allowed for grades of pass/fail.
In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill suspended the Dean's list in the Fall 2020 semester.

Academic Standing Effective 11/24/2020: Good Standing

2021 Spring

Course		Description	Attempted	Earned	Grade	Points
ECON	423	FINANCIAL MARKETS	3.000	3.000	A	12.000
ECON	520	ADV MACRO THEORY	3.000	3.000	A	12.000
GLBL	210	GLOBAL ISSUES	3.000	3.000	A	12.000
GLBL	381	GREAT DECISIONS	1.000	1.000	PS	0.000
MNGT	412	SOCIAL STRAT	3.000	3.000	A	12.000
PLCY	365	SEXUALITY AND GENDER	3.000	3.000	A	12.000
POLI	206	RACE & THE RIGHT TO VOTE IN US	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	19.000	19.000	18.000	72.000
Cumulative GPA	3.908	Cum Totals	66.500	120.500	65.500	256.000

In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill suspended the Dean's list in the Spring 2021 semester.
In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill implemented an emergency grading accommodation in the Spring 2021 that allowed for grades of pass/fail.

Academic Standing Effective 05/14/2021: Good Standing

End of Official Undergraduate Academic Record

Document Description

The face of this document contains information recorded by the University Registrar comprising the referenced student's academic record. Transcript explanations are shown below. For more information and clarification of historical transcripts and current records, please visit: http://registrar.unc.edu/academic-services/transcripts-certifications/transcript-key-information/

Grading System Explanation

Undergraduate Career

A (-)	Highest Level of Attainment
B (+,-)	High Level of Attainment
C (+,-)	Adequate Level of Attainment
D (+)	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
PS	Passing grade for course using Pass/Fail grading
SP	Satisfactory Progress (Authorized only for first portion of Honors Program)

Doctor of Dental Surgery Career

A	Highest Level of Attainment
B	High Level of Attainment
C	Adequate Level of Attainment
D	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
PS	Passing grade for course using Pass/Fail grading

Doctor of Medicine Career

The School of Medicine produces separate transcripts for students entering prior to Fall 2014 and seeking the MD degree.

Expanded grade information is available at: http://www.med.unc.edu/ome/registrar/transcripts

Doctor of Pharmacy Career

A	Highest Level of Attainment
B	High Level of Attainment
C	Adequate Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
H	Clear Excellence
IP	In Progress
P	Entirely Satisfactory
PS	Passing grade for course using Pass/Fail grading

Graduate Career

H	High Pass
P	Pass
L	Low Pass
F	Failed

Graduate grades of H, P, and L should not be interpreted as equivalent to undergraduate grades of A, B, and C, do not accrue quality points, and do not generate GPA

Note: Graduate students enrolled in courses numbered below 400 should receive undergraduate grades

CO	Conditional-final grade pending reexamination and/or limited additional academic work
COF	Fail after remediation
COP	Pass after remediation
F	Failed
H	Honors - Clear Excellence
HP	High Pass - Above Average
P	Pass - Entirely Satisfactory

Law Career

A (+,-)	Highest Level of Attainment
B (+,-)	High Level of Attainment
C (+,-)	Adequate Level of Attainment
D (+)	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
PS	Passing grade for course using Pass/Fail grading

Other Grade Symbols Shared Across Careers

AB	Absent from Exam
BE	(By Exam) Credit by examination without enrollment in the course
CC	(Composition Condition) May be assigned in addition to any regular grade and indicates marked deficiency in English composition
F*	Administratively assigned after failure to convert an Incomplete (IN) or absence (AB) to a grade within the allowed time
IN	Work Incomplete
NE	No Grade Expected
NG	(No Grade) No grade assigned Recorded for all "General Registration" (Course number 400) or Judicial Pending cases
NR	No grade reported
PL	(Placement) Credit based on an evaluation which places the student in an advanced course
W	Withdrawn without penalty
XF	Failure due to an honor court violation and can be changed to a grade of F if student completes prescribed steps to remediate the violation
***	(No Report) Class Roll not received

Course Numbering System

The numbers assigned to Courses are normally categorized as follows:

Effective Fall 2006	Courses Primarily For
001 - 199	First Years and Sophomores
200 - 399	Juniors and Seniors
400 - 699	Advanced Undergraduates and Graduate Students
700 - 999	Graduate Students Only

Quality Points and Quality Point Average

Quality Point Average is determined by dividing the sum of quality points by the sum of semester hours. Grades of NE, NG, NR, PS, SP, BE, PL, W, H, P and L do not generate quality points. Grades of IN and AB in the Undergraduate career (ONLY) are treated as an F.

Quality point values, per semester hour, are assigned as shown below:

A+	4.30	B+	3.30	C+	2.30	D+	1.30
A	4.00	B	3.00	C	2.00	D	1.00
A-	3.70	B-	2.70	C-	1.70	F	0.00
						XF	0.00

Length of the Year: The year consists of two regular semesters of approximately seventeen weeks and a summer session which is divided into two terms of approximately five and one half weeks each.
Credit Hours: One semester credit is the value of each lecture hour or two to three laboratory hours per week whether or not the course was passed.
Release of Information: A transcript is a confidential document that cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974.
Academic Standing: A student is in good academic standing unless otherwise noted on the transcript. Disciplinary penalties are shown only when these are in effect at the time the transcript is issued.

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write enthusiastically in support of Ethan Syster, a student at the George Washington University Law School who has applied to clerk in your chambers. Ethan was in my Civil Procedure class in Fall 2021 and my Legislation and Regulation class in Spring 2022. Ethan earned an A+ in Civil Procedure and an A in Legislation and Regulation. GW has a strict curve, and I give only a small number of solid A's, let alone A+'s. I was not surprised by Ethan's performance, however; he had consistently offered thoughtful insights during our class discussions. Ethan is a treat to have in class; he does not speak to hear his own voice, but when the class is struggling with a difficult concept, he will get the class back on the right track. Ethan's performance in my classes was not anomalous; his GPA is 3.95, which places him among a tiny number of students at the very top of the class.

Ethan has maintained this superlative level of academic performance while being fully engaged in the law school community outside of class. He is an Articles Editor on the Law Review, which is the most intellectually demanding and time-consuming position on the journal. He also served as a Writing Fellow, a prestigious position that requires excellence in that important craft. He has also served as a Peer Tutor for Civil Procedure and an officer-holder in the Government Contracts Student Association. Yet even though he has considerable demands outside of the classroom, Ethan has continued to receive top grades in his classes.

Ethan will come to a clerkship with meaningful legal experience under his belt. He will spend the summer after his second year of law school at Covington and Burling, a well-regarded firm in Washington, D.C. He spent the summer after his first year of law school in the Office of the Chief Counsel for the Transportation Security Administration at the U.S. Department of Homeland Security. In addition, he has externed during the academic semester—maintaining yet another ball in the air—at the U.S. Civilian Board of Contract Appeals and the U.S. Court of Federal Claims. I am sure that he will be able to hit the ground running in any clerkship.

Finally, Ethan is friendly, outgoing, and charming, and I am confident that he would be an excellent colleague. He is one of our very best. I warmly endorse Ethan Syster's clerkship application, and I hope that you will consider him carefully.

If you have any questions, please feel free to contact me.

Cordially,

Peter J. Smith
Professor of Law

Email: pjsmith1@law.gwu.edu
Office Phone: (202) 994-4797

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write this letter in strong support of Ethan Syster's application for a clerkship in your chambers. I am writing in my capacity as Ethan's Fundamentals of Lawyering Professor. Fundamentals of Lawyering is GW Law's required first-year legal research and writing class, in which students spend two semesters learning numerous foundational skills for the practice of law. As such, I have come to know Ethan well over the course of his 1L year and have no doubt that he would be a great asset to your chambers.

Ethan was one of the top students in my class last year, across two sections. He is extremely bright and always up to any challenge. In the fall semester, for example, he was the only student in my sections who chose to argue for the more difficult position on his closed research memorandum. Despite starting from a disadvantaged position, Ethan produced an exceptional draft, which received the highest grade in the entire class. Ethan likewise did not shy away from taking on a difficult question in class and was always eager to participate and contribute to our discussions in a very thoughtful and meaningful way.

Ethan also has tremendous work ethic and can do well despite an exceedingly high workload. Throughout his time in my class, he completed every assignment well before the deadline, went above and beyond the basic requirements, and always turned in high quality work product. He is also highly self-motivated and seeks out opportunities both in and out of class to get involved in meaningful projects, to develop essential skills, and to help others. In addition to his summer internship after 1L, he also took on an externship in the Fall of his 2L year and a judicial internship in the Spring of 2L. Alongside being an articles editor for the GW Law Review, he also serves as a Writing Fellow, where he helps first-year students master the skills of legal research and writing and I routinely hear from my current students how patient, clear, and helpful he is to them. In short, anything that Ethan puts his mind to, he does exceptionally well and manages to balance it all with ease and grace.

What impresses me most about Ethan, however, is that his achievements and drive to succeed never come at the expense of others. Not only is he a kind, pleasant, and joyful person, but he is also very mindful of letting other people shine whenever possible and happily takes a back seat, accepts a more challenging assignment, or volunteers for a shorter deadline to make sure his classmates are in the best possible position. He is a natural born leader, inspiring people with his respectful yet sure approach. I have had the opportunity to observe Ethan in numerous group settings, both large and small, and he always naturally emerges as the one others want to follow and emulate.

Ethan's work ethic, curiosity, intrinsic motivation, intellectual rigor, and overall positive attitude make him an excellent candidate for a clerkship in your chambers and I have no doubt that he would greatly contribute to your work.

Thank you for the opportunity to enthusiastically recommend Ethan for this position. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Katya S. Cronin

Associate Professor
Fundamentals of Lawyering Program
The George Washington University Law School
katya_cronin@law.gwu.edu
(202) 494-8748

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Mr. Syster's application for a judicial clerkship. During the Fall 2022, Mr. Syster completed a twelve-week legal clerkship with the Civilian Board of Contract Appeals (CBCA), while he was a second-year student at George Washington University Law School. The CBCA is a board of twelve judges with jurisdiction to decide government contract disputes pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), as well as other matters.

I am responsible for obtaining assignments and supervising the work of the law clerks. The assignments are substantively similar to the work expected in any judicial clerkship and require clerks to conduct legal research and draft orders, opinions, and legal memoranda. Clerks are attend hearings and arbitrations, and are also asked by the judges to participate in status conferences and other interactions with the parties in cases.

Mr. Syster received assignments from four judges on the Board, including myself, and completed six assignments. Mr. Syster wrote legal memoranda analyzing the applicability of different contract clauses in a construction contractor's delay claim and the merits of a motion to dismiss for lack of jurisdiction. Mr. Syster drafted decisions in an arbitration in which the Board was asked to review the denial of public assistance funds by the Federal Emergency Management Agency and on a Federal employee's appeal of a travel reimbursement decision.

We found Mr. Syster's work to be excellent. Mr. Syster's memoranda and draft decisions were well-written, well-organized, and well-researched. His thoughtful analysis assisted the judges in reaching the decisions in the respective cases. In two memoranda that he prepared for me in advance of a mediation, Mr. Syster correctly synthesized the legal principles applicable to the claims at issue and accurately assessed the strengths and weaknesses of the positions taken by the parties. In our discussions about his memoranda and the underlying case material, he articulated a sophisticated understanding of and approach to addressing the claims in mediation.

It was a pleasure to work with Mr. Syster. He is unfailingly professional and polite. His questions about assignments were clear, concise, and relevant. He completed his assignments promptly and demonstrated initiative by researching an additional issue he identified beyond the original parameters of one assignment. Mr. Syster will be an excellent judicial clerk and we highly recommend him for such a position.

Please contact me at (202) 606-8824 or through my chambers email address (sullivan.chambers@cbca.gov), if I may answer any questions or if you would like to speak with any of my colleagues about Mr. Syster's work for the CBCA.

Sincerely,

Marian E. Sullivan

Board Judge Civilian Board of Contract Appeals

ETHAN SYSTER
500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

The following writing sample is the final draft of my Note submitted for consideration for publication in *The George Washington Law Review*. My Note addresses recent developments in organizational conflicts of interest in federal procurement and proposes regulatory changes that achieve an optimal balance of the competing interests involved. Throughout the year I received iterative feedback from my Journal Adjunct and Notes Editor but the underlying writing and reasoning are entirely my own.

Ethan Syster Final Draft

Business Risk and Competitive Integrity: A Discretionary Approach to Organizational Conflicts of Interest in Federal Procurement

Abstract

Organizational Conflicts of Interest ("OCIs") arise when a contractor performing work for the federal government may have an unfair competitive advantage or may appear to be unable to provide unbiased contract performance to the Government due to the contractor's organizational and contractual relationships with other persons, companies, or organizations. The OCI guidance in the Federal Acquisition Regulation ("FAR"), which provides policies and procedures for federal executive agencies' acquisitions, has not been meaningfully revised since it was first published in 1984. However, the federal procurement landscape has changed dramatically since then. Increased Government outsourcing has led to ever-complicated business relationships that strain the application of these outdated guidelines and leave both the Government and industry ill-prepared to address modern OCI challenges. The current situation leads to both over-deterrence that undermines the taxpayers' best value and under-deterrence that threatens the competitive integrity of the acquisition system. The recent Preventing Organizational Conflicts of Interest in Federal Acquisition Act ("Preventing OCIs Act") recognized this concern and directed the FAR Council to provide updated OCI guidance.

This Note urges the FAR Council to respond by adopting revised OCI guidance that reflects the realities of modern federal contracting. While reforms have been proposed both in 2011 and through the recent Preventing OCIs Act, these reforms are but a helpful starting point. This Note builds upon and distinguishes from these reforms by differentiating between OCIs that involve competitive integrity concerns and OCIs that involve Government business risk concerns.

Table of Contents

Introduction

The U.S. House of Representatives Committee on Oversight and Reform reported that McKinsey & Company ("McKinsey")'s "failure to disclose or meaningfully address" conflicts of interest[1] "may have contributed to one of the worst public health epidemics in our nation's history"—the opioid crisis.[2] The report detailed the Committee's findings that McKinsey, one of the world's largest and most renowned consulting firms,[3] had concerning conflicts of interest between its work for the U.S. Food and Drug Administration ("FDA") and large pharmaceutical companies on the opioid crisis.[4] The Committee found that McKinsey failed to disclose "serious, longstanding" conflicts of interest, used its federal contracts to solicit private sector business, and had at least twenty-two consultants working simultaneously for the FDA and opioid

[1] Conflicts of interest are more fully defined later in this Note. *See infra* note 22 and accompanying text. Black's Law Dictionary defines a conflict as interest as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Conflict of Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019). The House's report defined a conflict of interest as when "a contractor possesses, as the result of other business relationships, the incentive to provide biased advice under a government contract." STAFF OF H. R. COMM. ON OVERSIGHT & REFORM, 117TH CONG., MAJORITY INTERIM STAFF REPORT "THE FIRM AND THE FDA: MCKINSEY & COMPANY'S CONFLICTS OF INTEREST AT THE HEART OF THE OPIOID EPIDEMIC" 35 (Comm. Print. 2022) (citing Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639 (2006)).

[2] STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 52. For general information on the effect of the opioid crisis see Nat'l Institute for Occupational Safety & Health, *Opioids in the Workplace: Data*, CENTER FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/niosh/topics/opioids/data.htmlhttps://www.cdc.gov/niosh/topics/opioids/data.html (last visited Apr. 5, 2023) (describing increasing drug overdose deaths largely attributable to synthetic opioids). *See also* LM Rossen et al., *Provisional Drug Overdose Death Counts*, NATIONAL CENTER FOR HEALTH STATISTICS, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htmhttps://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last visited Feb. 26, 2023).

[3] *See McKinsey Today*, MCKINSEY & COMPANY, https://www.mckinsey.com/about-us/overview/mckinsey-today (last visited Apr. 5, 2023) (describing McKinsey's work for "90 of the top 100 companies" as the company has doubled in size over the last 10).

[4] *See generally* STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 52 (describing how the House Oversight Committee found McKinsey had "overlapping and conflicting" work for FDA and opioid manufacturers).

manufacturers.[5] McKinsey ultimately entered into a settlement agreement with numerous state attorneys general because McKinsey's potential conflict "appear[ed] potentially to have violated federal law and contract requirements."[6] While the direct effects of McKinsey's potential conflict on the opioid crisis may never be quantifiable, it is possible that this conflict contributed to the large number of deaths caused by the opioid crisis.[7] In the year 2021, for example, 80,411 peopled died of an overdose involving an opioid—a significant increase from the 21,089 opioid overdose deaths in the year 2010.[8] Congress responded swiftly to the Committee on Oversight and Reform's investigation, with the Preventing Organizational Conflicts of Interest in Federal Acquisition Act ("Preventing OCIs Act") [9] directing amendments to be made to the Federal Acquisition Regulation ("FAR")'s[10] organizational conflict of interest ("OCI ") guidance. However, it is unclear when, if ever, the statute's purpose of establishing revised OCI guidance will be fulfilled as rulemaking in this area frequently takes years.[11]

Although McKinsey's potential conflict made news headlines,[12] other recent examples of OCIs that were not discussed in the news reveal a much deeper problem in the current OCI

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[5] *Id.* at 3-5.
[6] *Id.* at 52 (citing Commonwealth of Massachusetts, *Assented-To Motion for Entry of Judgment*, available at www.mass.gov/doc/massachusetts-mckinsey-consent-judgment (Feb. 4, 2021)).
[7] Nat'l Institute for Occupational Safety & Health, *supra* note 2; *see also* LM Rossen et al., *supra* note 2.
[8] *Drug Overdose Death Rates*, NATIONAL INSTITUTE ON DRUG ABUSE, Figure 3, https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#:~:text=Opioid%2Dinvolved%20overdose%20deaths%20rose,with%2080%2C411%20reported%20overdose%20deaths (last visited Feb. 26, 2023).
[9] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[10] The Federal Acquisition Regulation ("FAR") provides policies and procedures for federal executive agencies' acquisitions. *See* FAR 1.101 (1986) ("The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.")
[11] *See, e.g.*, *infra* Section I.C (discussing the 2011 proposed OCI guidance that was ultimately withdrawn 10 years later, in 2021).
[12] *See, e.g.*, Kevin Dunleavy, *Lawmakers Blast McKinsey for 'Serious Conflict of Interest' in Opioid Consulting*, FIERCE PHARMA (Apr. 15, 2022, 10:56 AM), https://www.fiercepharma.com/pharma/mckinsey-under-scrutiny-congress-serious-conflict-interesthttps://www.fiercepharma.com/pharma/mckinsey-under-scrutiny-congress-serious-conflict-interest; Ian MacDougall, *Congress Passes Bill to Rein in Conflicts of Interest for Consultants Such as*

guidance. For example, in *NetStar-1 Government Consulting, Inc. v. United States*,[13] both the disappointed offeror who brought the bid protest[14] and the contract awardee were determined to have conflicts of interest based upon their access to nonpublic competitively useful information gained under other contracts with the same agency.[15] There, unlike in the case of McKinsey, the concern was the integrity of the competitive acquisition process at the time of contract award, rather than the risk of unsuccessful contract performance due to contractor bias throughout the life of the resulting contract.[16] The U.S. procurement system places a high value on competition in the structure and procedure of the acquisition process.[17]

While these examples may make it easy to call for stricter conflict of interest rules, the answer is not that simple. Rather, policymakers must also consider that the very reasons these contractors have these conflicts of interest is also the reason the Government seeks their services: experience and expertise.[18] Unfortunately the FAR offers little guidance on how agencies are to

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McKinsey, PROPUBLICA (Dec. 16, 2022, 1:30 PM), https://www.propublica.org/article/congress-mckinsey-fda-purdue-pharma-conflictshttps://www.propublica.org/article/congress-mckinsey-fda-purdue-pharma-conflicts; Soo Rin Kim & Lucien Bruggeman, *Report Sheds Light on McKinsey's Alleged Conflicts of Interest*, ABCNEWS (Apr. 14, 2022, 7:45 AM), https://abcnews.go.com/US/report-sheds-light-mckinseys-alleged-conflicts-interest/story?id=84059749.

[13] 101 Fed. Cl. 511, 516 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *see infra* notes 124-135 and accompanying text.

[14] A bid protest is an adjudicative process by which interested parties can challenge an agency's award decision. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, *Bid Protests at GAO: A Descriptive Guide* (2018); FAR Subpart 33.1, 48 C.F.R. § 33.102 (2014). Interested parties can file a protest with the agency that took the challenged procurement action, the Government Accountability Office ("GAO"), or the U.S. Court of Federal Claims. FAR Subpart 33.1, 48 C.F.R. § 33.102 (2014). While there are differences between these fora that may affect a contractor's choice as to where to bring a protest these differences are largely unrelated to this Note as the GAO and Court of Federal Claims have similar standards of review for OCIs. *See* Michael J. Schaengold, et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 245-248 (2009).

[15] *NetStar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. at 516; *see infra* notes 124-135 and accompanying text.

[16] *See infra* Section III.A.

[17] *See* 41 U.S.C. § 3301 (requiring full and open competition in federal procurements); FAR 1.102(b)(iii) (2021) (stating that the Federal Acquisition system will "satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by promoting competition"); Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT 103, 104 (2002) (describing competition, integrity, and transparency as the "three overarching principles" of procurement law).

[18] *See, e.g.*, 48 C.F.R. § 209.571-3 (2010) ("Contracting officers generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DOD access to the expertise and

balance these competing interests, leading to both under-deterrence, awarding of contracts to firms with significant potential conflicts of interest, and over-deterrence, failing to award contracts to firms where a potential conflict of interest could have been waived, mitigated, or otherwise resolved.[19] This Note proposes revised guidance that provides agencies with the necessary framework to identify OCIs and adequately balance these competing interests in addressing potential conflicts.[20] Specifically, this Note suggests a distinction between OCIs that implicate government business risk and those that implicate competitive concerns. This Note proposes that OCIs involving government business risk are more appropriately suited for the Government to consider whether waiver is proper because the primary concern is the Government's own interests. OCIs that involve a risk to the integrity of the competitive process, however, should not be waived. because these conflicts involve the contractor's interests in the opportunity for competitive award of the contract.

Part I provides background on OCIs, federal outsourcing, and reforms to OCI guidance proposed both in 2011 and through recent legislative action. Part II then analyzes why the current FAR guidance is outdated, specifically identifying gaps between the outdated guidance and modern realities, and why the 2011 proposed solutions are a helpful starting point. Finally, Part III proposes revised guidance that would allow agencies to recognize the tradeoff between risk of

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experience of qualified contractors."); Fred W. Geldon & Caitlin Conroy, *Is the OCI Pendulum Swinging Back at GAO?*, 18-13 BRIEFING PAPERS 1, 13 (2018) ("Watch out for Catch-22: the reason you want the contractor to perform the work may be the precise reason why there is an OCI that cannot be mitigated. Balance the need for expertise with the need for impartiality"); Robert S. Metzger, *Final DFARS OCI Rules*, PILLSBURY, (Jan. 11, 2011), https://www.pillsburylaw.com/images/content/3/4/v2/3449/CorporateSecuritiesAdvisoryFinalDFARSOCIRules01052011final.pdf (describing how contracting officers "default[ing]" to "avoidance or 'restrictions on future contracting,'" would have negative results by denying access "to the most capable and best informed contractors"); Jon W. Burd, *Do We Still Need OCI Reform?*, WILEY (2015), https://www.wiley.law/newsletter-5228 (describing the benefits of "Government discretion to accept the business risk of a contractor's impaired judgment").

[19] *See* Ralph C. Nash Jr., *Organizational Conflicts of Interest: An Increasing Problem*, 20 NASH & CIBINIC REP. ¶ 24, May 2006 (describing the inadequacies of the FAR guidance); FAR Subpart 9.5, 48 C.F.R. § 9.500 Organizational and Consultant Conflicts of Interest (current guidance).

[20] *See generally infra* Part III.

bias and benefit of expertise in OCIs that pose a risk to successful contract performance while preserving the protection against threats to the integrity of the competitive process presented by other OCIs. Specifically, Part III expands upon how the FAR Council should give effect to Congress's mandate to issue revised OCI guidance through a distinction between business risk and competitive integrity OCIs.

I. The Context: Increasing Conflicts and a History of Failed Proposals

The modern realities of Government contracting are significantly different from the context of the adoption of FAR OCI guidance in 1984. This Part describes the current guidance, trends that have challenged the vitality of the current guidance, and proposed reforms.

A. Current OCI Guidance: "You figure it out"[21]

The FAR defines an OCI as a situation where "a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage" because of "other activities or relationships with other persons."[22]

The Government Accountability Office ("GAO"),[23] in *Aetna Government Health Plans, Inc.* [24] divided OCIs into three categories ("Aetna categories"): (1) biased ground rules, (2)

[21] Nash, *supra* note 19, at 1.
[22] FAR 2.101 (2023). It is accepted that the word "person" here refers to a company or organization. Ralph C. Nash & John Cibinic, 15 NASH & CIBINIC REP. ¶ 5, 13-14 (Jan. 2001). In fact, the FAR distinguishes an OCI from a personal conflict of interest ("PCI") which is defined as "a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract," and is not the subject of this Note. FAR 3.1101 (2011). For a discussion of the need for PCI reform see Kathleen Clark, *Ethics for an Outsourced Government*, 5 (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper No. 11-05-03, 2011), https://ssrn.com/abstract=1840629https://ssrn.com/abstract=1840629, at 31.
[23] The GAO is one forum where bid protests can be litigated. *See supra* note 14.
[24] B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995).

unequal access to information, and (3) impaired objectivity.[25] While the FAR has not explicitly adopted this framework, the examples provided in the FAR largely follow these same broad contours.[26] A biased ground rule OCI occurs when a firm's contract for acquisition support services raises the possibility that the firm could gain an unfair competitive advantage in competing for a contract for which it develops the requirements or other procurement specifications. [27] In *International Business Machines Corp.*,[28] the GAO found that there was a biased ground rule OCI and held that the agency was proper in its elimination of a contractor who had previous involvement in developing the statement of work, solicitation, and other "key acquisition documents" for a contract the contractor was now seeking to compete for.[29] An unequal access to information OCI occurs when a contractor has access to nonpublic competitively useful information that may give the contractor an unfair competitive advantage.[30] For example, the OCI in *NetStar-1 Government Consulting, Inc.* was based upon the contractor's access to a budget plan under a previous contract which was nonpublic and competitively useful information for the contract that it was now competing for.[31] There is often considerable overlap in these first two categories as most examples of biased ground rule OCIs also inherently involve unequal access to information.[32] Finally, an impaired objectivity OCI occurs when a contractor's

[25] *Id.* at 11-12. *See* Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONTRACT L.J. 25, 32 (2005) (describing the *Aetna* categorization and its further implementation by the GAO).
[26] *See generally* FAR 9.505 (2019) (outlining the procedures regarding OCIs and several common hypothetical examples).
[27] *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 9; Michael J. Farr, *Organizational Conflicts of Interest (OCIs) What Every Contract Law Attorney Needs to Know*, 42 THE REPORTER 44, 46 (2015).
[28] B-410639, et al., 2015 CPD ¶ 41, at 1 (Comp. Gen. Jan. 15, 2015).
[29] *Id.* at 1.
[30] *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 8; Farr, *supra* note 27, at 46.
[31] *NetStar-1 Government Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (holding that a contractor's access to the budget execution plan created an unequal access to information in a contract to provide management support services).
[32] For example, the biased ground rule OCI in *International Business Machines Corp.*, 2015 CPD ¶ 41, could be considered an unequal access to information OCI as well as the contractor likely gained nonpublic competitively useful information in developing the underlying solicitation documents. However, the unequal access to information

performance could be biased by its other contracts or business interests.[33] Specifically, in *Alion Science & Technology Corp.*,[34] the GAO sustained a protest where the awardee would have analyzed and evaluated policies and regulations that directly affected the awardee and its competitors.[35]

The first two categories, biased ground rules and unequal access to information, focus upon the fairness of the acquisition process, whereas the final category, impaired objectivity, is concerned with the business risk of unsuccessful contract performance to the Government posed by the potential for biased contractor judgment.[36] Both academic commentators and the GAO have recently focused upon the third category, impaired objectivity, because impaired objectivity OCIs can be difficult to identify.[37] This is due to the wide range of activities which may bias a contractor's judgment and contracting officers[38] must rely upon information that only the contractor may have.[39] The FAR describes two "underlying principles" supporting OCI policy: (1) preventing conflicts that may bias contractor judgment, and (2) preventing unfair competitive advantage.[40] The *Aetna* categories give effect to the two principles underlying FAR OCI guidance.

OCI in *Netstar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. at 524, likely was not also a biased ground rules OCI because the previous contract giving rise to the conflict was not a contract for acquisition support services.

[33] *See Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129 at 1 (finding an impaired objectivity OCI to exist "where an affiliate of one offeror's major subcontractor evaluates proposals for the procuring agency."); Farr, *supra* note 27, at 47.

[34] B-297342, 2006 CPD ¶ 1 (Comp. Gen. Jan. 9, 2006).

[35] *Id.* at 7-8/

[36] *See* Christopher R. Yukins, *The Draft OCI Rule—New Directions and The History of Fear*, 53 GOV'T CONTRACTOR 18 ¶ 148, at 4 (2011) (distinguishing between OCIs that threaten competitive fairness and OCIs that raise the risk of biased contract performance).

[37] *See* Megan A. Bartley, *Too Big to Mitigate? The Rise of Organizational Conflicts of Interest in Asset Management*, 40 PUB. CONT. L.J. 531, 539 (2011) (discussing the concern for impaired objectivity OCIs); Yukins, supra note 36, at 2 (noting that "impaired objectivity OCIs appeared to trigger the most concern at GAO.").

[38] The FAR defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings." FAR 2.101 (2023).

[39] *See* Bartley, *supra* note 37, at 539; Yukins, *supra* note 36, at 2.

[40] FAR 9.505 (2019).

The FAR requires that agencies "identify and evaluate" potential OCIs and "avoid, neutralize, or mitigate" significant potential OCIs prior to award.[41] This requirement is based upon the federal acquisition system's focus on competition, integrity, and transparency.[42] Scholars argue that the specific focus of the OCI rules has shifted over time from an original fear of unequal access to information to a concern for the effect of impaired objectivity OCIs.[43] Fears of unequal access to information OCIs arise from the procurement system's focus on competition.[44] The Competition in Contracting Act[45] ("CICA") requires full and open competition in most government procurements and competition is a core policy goal of the U.S. acquisition system.[46] This goal arises from the theory that maximizing competition allows the government to receive its best value in terms of price and quality.[47] The system promotes competition by demonstrating that "competitors will be impartially considered for award" of government contracts.[48] Impaired objectivity OCIs often arise out of a concern for the potential

[41] FAR 9.504 (1991).
[42] *See* Farr, *supra* note 27, at 49-50 (discussing OCIs through the concern for ensuring integrity and fair competition); Schooner, *supra* note 17, at 104 (describing competition, integrity, and transparency as the "three overarching principles" of procurement law); Gordon, *supra* note 25, at 41 (framing OCIs as an issue of integrity).
[43] *See* Yukins, *supra* note 36, at 1-2 (explaining how OCIs grew out of a concern for unequal access to information but have since shifted to impaired objectivity OCIs). For a historical perspective of OCIs see Adam Yarmolinsky, *Organizational Conflicts of Interest*, 24 FED. B.J. 309 (1964) (discussing OCIs as they relate to defense research and development contracts in the 1960s).
[44] *See* Yukins, *supra* note 36, at 1 (describing the concern that "large weapon system integrators, which dominated the military-industrial complex at that time, would control competitions by controlling critical design information– they would gain "unequal access to information.").
[45] 41 U.S.C. § 3301.
[46] *Id.*; *see also* FAR 1.102(b)(iii) (2021) (stating that the Federal Acquisition system will "satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by promoting competition").
[47] Schooner, *supra* note 17, at 104 (describing competition, as a core principle of the U.S. procurement system and explaining that such a principle is based upon Adam Smith's theory that individuals pursuing their self-interest in the marketplace will result in better outcomes for all market participants) (citing Adam Smith, *The Wealth of Nations* (ed. Edwin Canaan, University of Chicago Press, 1976)).
[48] *Id.* at 104.

of unsuccessful contract performance due to biased judgment, rather than competitive concerns.[49]

Current FAR guidance requires a high burden to establish a significant potential OCI and contracting officers have substantial discretion in addressing OCIs. The FAR only requires that *significant* potential conflicts of interest be resolved through avoidance, neutralization, or mitigation.[50] Further, the standard required to prove an OCI is "hard facts" rather than "mere inference or suspicion."[51] Agencies also have the option of unilaterally waiving a significant potential conflict of interest if it is in the Government's interest.[52] Courts and the GAO give great deference to agency discretion in determining when waiver of an OCI is in the Government's interest.[53] Notably, the GAO typically sustains bid protests[54] when an agency failed to conduct a thorough evaluation of a potential OCI rather than when an agency conducted

[49] *See* Yukins, *supra* note 36, at 2; Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011) (distinguishing between harms to competitive integrity and harms to Government business interests); *infra* Section III.A.

[50] FAR 9.504 (1991); *see also Turner Construction Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011) ("The FAR therefore requires mitigation of 'significant potential conflicts,' but does not require mitigation of other types of conflicts, such as apparent or potential non-significant conflicts.").

[51] *Deloitte Consulting LLP*, B-420137.7, et al., 2022 CPD ¶ 200, at 7 (Comp. Gen. July 25, 2022) (requiring "hard facts" to find an OCI); Farr, *supra* note 27, at 49 (further explaining the "hard facts" standard); *VSE Corp.*, B-404833.4, 2011 CPD ¶ 268, at 26 (Comp. Gen. Nov. 21, 2011) (recommending "that the [contracting officer] reconsider the available information, and obtain any new information necessary, to establish the 'hard facts'").

[52] FAR 9.503 (2022).

[53] *See, e.g.*, *CACI, Inc., et al*., B-413860.4, et al, 2018 CPD ¶ 17, at 1 (Comp. Gen. Jan. 5, 2018) (denying a protest alleging that the agency's waiver was improper because the waiver was not issued until after award); *see also Ares Technical Services Corp.*, B-415081.2, et al., 2018 CPD ¶ 153, at 4 (Comp. Gen. May 8, 2018) ("while [GAO] will review an agency's execution of an OCI waiver, [GAO's] review is limited to consideration of whether the waiver complies with the requirements of the FAR, that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency."); *Steel Point Solutions, LLC*, B-419709.3, 2022 CPD ¶ 14, at 3-4 (Comp. Gen. Dec. 21, 2021) (affirming this understanding of GAO's role in the OCI waiver review process); Gordon, *supra* note 25, at 37 (describing the FAR's provisions allowing for agency waiver of OCIs); Burd, *supra* note 18.

[54] For a description of the bid protest process see *supra* note 14.

such an evaluation and determined that the potential OCI was not significant or could be resolved.[55]

Once an agency determines a significant potential OCI exists, the agency must—if it does not waive the OCI—take action to resolve the OCI by mitigating, avoiding, or neutralizing the conflict.[56] The contractor can mitigate OCIs through information firewalls or work allocation firewalls.[57] The Government can avoid an OCI, for example, by reducing the statement of work to remove the conflicted work from the scope of the contract, and then either perform the work in-house or under a different contract.[58] Agencies, similarly, may neutralize the conflict by disqualifying the contractor from current or future work.[59] Contracting officers can use OCI clauses in the solicitation and require submission of OCI mitigation plans with, or in advance of, proposal submission, to accomplish their dual mandate of identifying potential conflicts and resolving significant potential conflicts.[60] However, current FAR guidance does not require that an agency include a solicitation provision requiring disclosure of potential OCIs in most instances.[61] Rather the FAR only requires the inclusion of such a clause when the contracting officer determines that the particular acquisition involves a significant potential conflict of

[55] *See generally*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-520SP, GAO BID PROTEST OVERVIEW 7-8 (2011), https://www.gao.gov/assets/gao-12-520sp.pdf.
[56] FAR 9.504(a)(2) (1991); Gordon, *supra* note 25, at 37-39 (describing agency actions required by the FAR to address OCIs).
[57] *See, e.g.*, *Alion Sci. & Tech. Corp.*, B-297022.4, 2006 CPD ¶ 146 (2006) (finding that a conflict of interest had been mitigated where the agency and contractor had implemented a firewall that included a subcontractor performing the conflicting work).
[58] James Jurich, *International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review*, 7 EUROPEAN PROCUREMENT & PUB. PRIVATE PARTNERSHIP L. REV. 242, 251 (2012).
[59] *Lucent Technologies World Services, Inc.*, B-295462, 2005 CPD ¶ 55 (Comp. Gen. 2005) (denying a bid protest by the excluded offeror where the agency reasonably determined a significant potential OCI to exist).
[60] FAR 9.504 (1991); FAR 9.507 (1990).
[61] *See generally* FAR Subpart 9.5 (1990).

interest.[62] Moreover, even when such a provision or clause is included, it typically does not require ongoing disclosure of potential OCIs throughout the performance of the contract.[63]

The current guidance provides contracting officers with several different mechanisms for resolving OCIs but little guidance on how to apply these mechanisms based upon the different concerns raised by different types of OCIs.[64] Rather, the FAR notes that "[t]he exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it."[65] As Ralph C. Nash Jr., a leading government procurement scholar points out, this tells readers nothing more than "[y]ou figure it out."[66]

B. Government Outsourcing

The problems resulting from the lack of guidance on OCIs have been exacerbated by government outsourcing. Political pressure to downsize the federal Government has led to increased outsourcing in the form of higher federal spending on service contracts and therefore greater potential for conflicts of interest.[67] In addition to these political pressures, efforts to address the skills gaps in the federal workforce identified by the GAO, have led to increased government outsourcing.[68] A February 2023 GAO report found that the federal government

[62] FAR 9.506(b)(2) (2022)
[63] *See generally* FAR Subpart 9.5 (1990).
[64] *See generally id.*
[65] FAR 9.505 (2019).
[66] Nash, *supra* note 19, at 1.
[67] *See* Steven L. Schooner & Collin D. Swan, *Suing the Government as a 'Joint Employer' –Evolving Pathologies of the Blended Workforce*, 52 GOV'T CONTRACTOR 39 ¶ 341, 2-3 (Oct. 2010) (describing how political efforts to downsize the federal Government have led to increases in federal service contracts); Gordon, *supra* note 25, at 26 (describing Government outsourcing, particularly of services requiring the exercise of judgment, as one of multiple reasons for increasing OCIs).
[68] *See* Schooner & Swan, *supra* note 67, at 2; Laura Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SECURITY L. & POL'Y 521, 524 (2012) ("a political culture that assumes the efficiency of the private sector (without necessarily accumulating data to prove it) makes the hiring of contract workers much easier politically than expanding the number of Government employees").

generally, and the Office of Personnel Management ("OPM") specifically, suffered from a skills gap, particularly in areas of human resources, cybersecurity and acquisition.[69] The report notes that "strategic human capital management, specifically . . . government-wide and agency specific skills gaps, has been on GAO's High-Risk List since 2001."[70] This increase in federal service contracts leads to a heightened potential for conflicts of interest.[71] The phenomenon has been described as a "blended workforce" in which "contractors work alongside, and often are indistinguishable from, their Government counterparts."[72] Estimates suggest that more than 300,000 service contractor jobs were created between 1990 and 2002.[73] This trend has only increased with the Government spending nearly 60% of contract dollars on service contracts in fiscal year 2020.[74] Further, recent increases in the Government's use of temporary service contracts have led to additional instances of contractor personnel working alongside federal Government employees, often on a short-term basis to fulfill skills or other personnel gaps within the Government workforce, rather than on a long-term basis.[75] As the Government continues to rely upon additional service contractors, there will continue to be increased risk of potential organizational conflicts of interest.

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[69] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105528, FEDERAL WORKFORCE: OPM ADVANCES EFFORTS TO CLOSE GOVERNMENT-WIDE SKILLS GAPS BUT NEEDS A PLAN TO IMPROVE ITS OWN CAPACITY 18 (2023).
[70] *Id.* at 1.
[71] *See* Clark, *supra* note 22, at 31 (arguing that additional personal conflict of interest rules are needed in response to the federal Government's reliance on personal service contracts); *see also* Gordon, *supra* note 25, at 26.
[72] Schooner & Swan, *supra* note 67, at 1.
[73] *Id.* at 2.
[74] *A Snapshot of Government-wide Contracting for FY 2020*, U.S. GOV'T ACCOUNTABILITY OFF., (June 22, 2021), https://www.gao.gov/blog/snapshot-Government-wide-contracting-fy-2020-infographichttps://www.gao.gov/blog/snapshot-Government-wide-contracting-fy-2020-infographic.
[75] *See* Chris Schwartz and Laura Padin, *Temping Out the Federal Government*, NAT'L EMP. L. PROJECT, (2019) https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdfhttps://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdf (describing the Government's use of temporary service contracts).

C. 2011 Proposed Solutions and Recent Legislation

Many commentators and practitioners recognized the increased risk of conflicts of interest due to Government outsourcing in 2011, which led to an opportunity for reform.[76] The GAO issued a report identifying the need for OCI reform and urging the FAR Council[77] to take up the issue.[78] Specifically, the GAO recognized that the procurement community needed additional guidance on addressing contractors' access to sensitive information.[79]. In response to the concerns regarding conflicts of interest resulting from contractor's access to sensitive information raised in the 2010 GAO report, the FAR Council issued a proposed rule for notice and comment.[80] Importantly, the proposed rule would similarly have abandoned the *Aetna*[81] categories and focused on differentiating between OCIs that pose a risk to the competitive acquisition process and those that pose a business risk to the Government as FAR 9.505

[76] *See* Jurich, *supra* note 58, at 250 (discussing 2011 proposed rules).
[77] The FAR Council, which is made up of the Secretary of Defense, the Administrator of General Services ("GSA"), and the Administrator of the National Aeronautics and Space Administration ("NASA"), is responsible for updating and maintaining the FAR through administrative rulemaking. *See* FAR 1.103(b) (2014) ("The FAR is prepared, issued, and maintained, and the FAR System is prescribed jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities."). However, the FAR Council sometimes acts in response to issues raised in a GAO report, direction from Congress, public or industry pressure, as well as the executive branch's Office of Federal Procurement Policy. *See* KATE M. MANUEL, ET AL., CONG. RSCH. SRVC., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 15-19 (2015) (describing the stakeholders involved in federal regulation of government procurement). All of these stakeholders play a role in the development of acquisition policy. *Id.* at 15-19.
[78] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-693, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (2010) (recommending that the FAR council examine the need for additional guidance regarding unequal access to information OCIs).
[79] *Id.* at 30.
[80] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). Notably, the revised guidance was principally authored by Dan Gordon—the same GAO attorney who authored the *Aetna* decision establishing the three categories of OCIs. *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129.
[81] These three categories are (1) biased ground rules, (2) unequal access to information, and (3) impaired objectivity. *See supra* note 25 and accompanying text.

provides.[82] Further, the proposed rule would have moved the OCI provisions to FAR Part 3, which addresses improper business practices.[83]

Under the proposed rule, contracting officers would have greater discretion to accept the risks posed by impaired objectivity OCIs, out of recognition that such a decision is based upon business judgment rather than a threat to the integrity of the procurement process.[84] The proposed rule was ultimately withdrawn in 2021.[85] The GAO report listed its recommendations as closed when the proposed rule was announced.[86] However, given that the rule was never implemented, these concerns surrounding increased instances of OCI challenges, particularly those involving contractor access to sensitive information, still exist and have been exacerbated by increased outsourcing in the years since.[87] Thus, this is an area where proposed solutions have laid dormant for years and ultimately remain unenacted.

The Defense Federal Acquisition Regulation Supplement ("DFARS"),[88] which governs acquisitions within the Department of Defense ("DOD"), was amended in 2011 to address OCI

[82] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011).
[83] *Id.*; Yukins, *supra* note 36, at 2 (arguing that the focus upon impaired objectivity OCIs reflects shifting concern among policymakers and the procurement community).
[84] Yukins, *supra* note 36, at 2 (discussing the different concerns underlying waiver of impaired objectivity OCIs); Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011).
[85] Federal Acquisition Regulation; Organizational Conflicts of Interest, 86 Fed. Reg. 14,863 (Mar.19, 2021) (withdrawing the 2011 proposed rule). It is not clear why the rules were never enacted. Speculatively, it may be because the proposed rule's author, Dan Gordon, retired from government service in 2011, leaving the rules without an advocate to shepherd them through the oft unsuccessful process of notice-and-comment rulemaking. *See White House Administrator Joins Law School*, GWTODAY (Nov. 2, 2011), https://gwtoday.gwu.edu/white-house-administrator-joins-law-schoolhttps://gwtoday.gwu.edu/white-house-administrator-joins-law-school (discussing Gordon's retirement from government service); *see generally* Jason Webb Yackee, Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395 (2016) (discussing the theory of ossification of administrative law due to increasing judicial requirements for agency rulemaking and finding that agencies only issue binding regulations in response to 41% of statutory authorizations).
[86] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 78, at 30.
[87] *Id.* at 30. For a discussion of Government outsourcing see *supra* Section I.B.
[88] Several agencies have their own agency-specific supplements to the FAR that impose additional requirements upon agency acquisitions. *See, e.g.*, 48 C.F.R. § 201.301 (2015) (Department of Defense Acquisition Regulation Supplement); 48 C.F.R. § 401.000 (1996) (Agriculture Acquisition Regulation Supplement). For a discussion of the relationship between agency supplements and the far see MANUEL ET AL., *supra* note 77, at 19.

concerns but did not include the robust amendments initially proposed in 2010.[89] Some argued the difference between the proposed and implemented DFARS rule was in anticipation of the 2011 proposed changes to the FAR, which would apply to DOD and civilian agencies.[90]

Following the withdrawal of the 2011 proposed rule in 2021, and the House Oversight Committee's report on McKinsey, there has been renewed congressional attention on the issue of conflicts of interest in federal procurement.[91] Specifically, the Preventing OCIs Act—which directs the FAR Council to take further action to prevent OCIs—was signed into law on December 27, 2022. [92] The Act provides little specificity, but directs that the FAR Council provide updated definitions, guidance, and examples of OCIs.[93] The Act requires that the FAR Council provide examples of OCIs involving private-sector clients.[94] Many argue that McKinsey's consulting for the FDA and pharmaceutical companies was not addressed by current OCI guidance because the guidance is unclear as to whether an OCI could arise from a government contractor's work for a private company—in McKinsey's case Purdue and other pharmaceutical companies—rather than the government contractor's work on another government contract.[95] Potential conflicts such as these were not specifically addressed in the original FAR OCI guidance because the federal Government had very few consulting and

[89] *Compare* DFARS; OCI in MDAPs (DFARS Case 2009-D015), 75 Fed. Reg. 20954 (proposed Apr. 22, 2010) *with* Department of Defense Federal Acquisition Regulation Supplement ("DFARS") Case 2009-D015). 75 Fed. Reg. 81908 (to be codified at 48 C.F.R. pt. 209 and 252). *See also* Metzger, *supra* note 18, at 5-7 (comparing the final rule with the originally proposed rule).
[90] *See, e.g.*, Metzger, *supra* note 18, at 1.
[91] *See* DAVID H. CARPENTER, CONG. RSCH. SERV., LSB10772, FEDERAL PROCUREMENT RESTRICTIONS ON ORGANIZATIONAL CONFLICTS OF INTEREST (2022) (discussing potential legislative solutions to address issues with the current FAR guidance on OCIs).
[92] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[93] *Id.*
[94] *Id.*
[95] *McKinsey & Company's Conduct and Conflicts at the Heart of the Opioid Epidemic, Before H. Comm. on Oversight and Reform*, 117th Cong. (2022) (testimony of Jessica Tillipman, Assistant Dean for Government Procurement Law Studies, The George Washington University Law School).

personal service contracts at the time.[96] The FAR Council is also directed to provide executive agencies with solicitation provisions and contract clauses requiring contractor disclosure of information relevant to potential OCIs but prior to award and throughout performance.[97] The Act provides that agency executives will be able to tailor the solicitation provisions and contract clauses "as necessary to address risks associated with conflicts of interest and other considerations that may be unique to the executive agency."[98]

The passage of this Act is not enough to address the issue of outdated guidance. Rather, the FAR Council must follow the notice-and-comment rulemaking process to effectuate revisions to the FAR.[99] The ultimate withdrawal of the 2011 proposed solutions after a decade of inaction makes this follow-through all the more important.[100] This Note seeks to provide some potential solutions for the FAR Council, including a renewed focus on the distinction between competitive integrity and business risk OCIs, both in response to and beyond what is required by the Act.[101] While Congressional momentum in response to the McKinsey investigation has created an opportunity for reform, more specific solutions are needed.

II. The Problem: Outdated, Inadequate, and Unclear Guidance

The foregoing discussion explains how the modern federal workforce differs from what the drafters of the FAR anticipated in 1984. This Part explains why those differences create gaps that the current guidance fails to adequately address. Revised guidance that distinguishes between business risk and competitive integrity OCIs is needed to address these gaps.

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[96] For a discussion of government outsourcing see *supra* Section I.B.
[97] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[98] *Id.*
[99] MANUEL, ET AL., *supra* note 77, at 11 (describing the process for amending the FAR.)
[100] *See supra* Section I.C.
[101] *See infra* Part III.

A. Current FAR Guidance is Outdated, Inadequate, and Unclear

Currently, the outdated OCI guidance in the FAR is inadequate in addressing the modern realities of the federal contracting. Further, the guidance is unclear, leaving contracting officers and contractors struggling with how such guidance should apply in a given situation. This section explains specifically how changes in the government contracting landscape have made the current guidance outdated, inadequate, and unclear.

i. Outdated and Inadequate Guidance

The gaps in the current OCI guidance in the FAR lead to both underdeterrence and overdeterrence. Specifically, the FAR's current guidance fails to address the role of subcontractors' conflicts of interest, does not recognize the complex business relationships created by outsourcing, and ignores the different types of risk that different OCI's impose.[102] In *Safal Partners, Inc.*[103] the protester, Safal Partners, Inc. ("Safal") challenged award of a contract for technical assistance services to Manhattan Strategy Group, LLC ("MSG"), whose subcontractor also held a contract with the same agency.[104] Safal alleged the subcontractor stood to benefit financially by recommending grantees under the subcontractor's existing contract for technical assistance provided by the subcontractor and MSG under the new technical assistance contract.[105] The contracting officer determined that this did not constitute an OCI because the agency retained authority to make determinations on technical assistance and the subcontractor merely provided recommendation.[106] However, the GAO disagreed, emphasizing the

[102] *See generally* FAR Subpart 9.5 (current guidance); *see also* Gordon, *supra* note 25, at 36-39 (describing the need for additional guidance regarding subcontractors); Nash, *supra* note 19 (discussing inadequacies within the current OCI framework).
[103] B-416937, 2019 CPD ¶ 20 (Jan. 15, 2019).
[104] *Id.*
[105] *Id.* at 9-10.
[106] *Id.* at 9-10.

subcontractor's inability to render impartial advice and sustained the bid protest.[107] The FAR currently provides no specific guidance on how an agency and prime contractor should address subcontractor conflicts of interest.[108] Yet, *Safal Partners, Inc.*, makes clear that such complex contracting relationships in management support and consulting contracts are a reality of modern contracting and updated FAR guidance on OCIs must build upon the GAO's focus on the contractor's ability to render impartial advice.[109]

While many aspects of the FAR lend significant deference to agency personnel, the FAR typically provides guidance on how this discretion should be exercised.[110] The FAR guidance regarding OCIs lacks this key feature, leaving contracting officers to resolve the issues themselves.[111] Adequate guidance should equip agency personnel with a framework to exercise this discretion in instances where OCIs pose a business risk to the Government through the potential for impaired contractor performance while also protecting against OCIs that threaten the integrity of the competitive process.

ii. Unclear Guidance

In addition to the substantive gaps, the FAR's OCI guidance is unclear. Courts and the GAO have addressed OCIs through a myriad of case law but, without updated FAR guidance,

[107] *Id.* at 9-10.
[108] *See generally* FAR Subpart 9.5.
[109] For another example of a bid protest involving subcontractor OCIs, see, e.g., *International Business Machines Corporation*, B-410639, et al., 2015 CPD ¶ 41, at 8 (Jan. 15, 2015) (denying the protester's challenge that it had been improperly excluded from a competition because key personnel of its proposed subcontractor, Booz Allen Hamilton, were involved in developing key acquisition strategies for the procurement).
[110] *See, e.g.*, FAR 15.101 (2022) (providing guidance to contracting officers on the "best value continuum" and how a tradeoff process or lowest price technically acceptable source selection process may be more or less appropriate depending upon Government needs); FAR Subpart 16.1 (providing guidance to contracting officers on selecting contract types).
[111] *See generally* FAR 9.5 (current guidance); *see also* Nash, *supra* note 19 (discussing inadequacies within the current OCI framework); Gordon, *supra* note 25 (describing gaps in the current OCI guidance).

agencies are left struggling to find centralized answers to complex OCI questions.[112] Between the definitions in FAR 2.101, the *Aetna* categories, the two underlying principles described in FAR 9.505, and the examples provided in FAR 9.508, the current guidance surrounding OCIs, is inaccessible and often unclear.[113] Each of these sources in the FAR and GAO case law provides a somewhat different answer to the questions of how an OCI is defined, what concerns OCIs are meant to address, and how agencies should analyze them.[114] This leaves both contractors and the Government without clear direction on how to handle the multitude of fact-specific contexts in which OCIs arise.[115]

As a result, contractors and the Government are unable to make predictions about how courts or the GAO might analyze a specific potential conflict. Courts and the GAO have emphasized the fact-specific nature of the potential conflicts and the need to handle OCI evaluations on a case-by-case basis which leaves interested parties unable to make informed decisions regarding potential conflicts.[116] Some argue that a risk-averse culture has led to the

[112] *See* discussion *supra* Section I.A. *Compare* FAR 2.101 (2023) (defining OCIs) *and* FAR 9.505 (2019) (describing OCI policy concerns and providing examples of OCI) *with Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995) (categorizing OCIs as "biased ground rules," "unequal access to information," and "impaired objectivity"). *See also* Alan Chvotkin, *Stretching the Limits of FAR OCI Rules*, NICHOLS LIU (June 9, 2022), https://nicholsliu.com/stretching-the-limits-of-far-oci-rules/https://nicholsliu.com/stretching-the-limits-of-far-oci-rules/ (discussing the conceptual and practical limitations of the current FAR guidance).

[113] *See* sources cited *supra* note 112. For a discussion of the importance of uniformity in procurement law see Schooner, *supra* note 17, at 109 (describing the efficiency benefits of uniformity in the procurement system).

[114] FAR 2.101 (2023); FAR 9.505 (2019); *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 11-12.

[115] *See, e.g.*, *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (discussing how the contractor, the agency, the GAO, and the Court of Federal Claims all held differing understandings as to whether an OCI existed).

[116] *See, e.g., Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009) ("the FAR recognizes that the identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion."); *see also Valdez International Corp.*, 2011 CPD ¶ 13, at 1 (Comp. Gen. Dec. 29, 2010) (citing *Axiom* in holding that the "contracting officer's determination that the awardee's contract performance would not pose an organizational conflict of interest (OCI) was reasonable"); *Guident Technologies, Inc.*, B-405112.3, 2012 CPD ¶ 166, at 7 (Comp. Gen. June 4, 2012) ("We review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable."); *QinetiQ North America, Inc.*, B-405008, B405008.2, Jul. 27.

Government unnecessarily excluding offerors who do not actually pose a significant potential conflict of interest, thereby negatively impacting not only that disappointed offeror but also the taxpayer who may have benefited from that offeror's superior service or expertise as the best value for the Government.[117] Further, OCIs are a common protest ground because the effect of a sustained protest is often disqualification, rather than simply corrective action to re-evaluate all proposals.[118] Agencies can use waiver as a last minute measure to avoid a sustained bid protest or otherwise adequately addressing OCIs.[119] This allows agencies to circumvent the FAR's intent to protect the integrity of fair competition.[120] Thus, the current systems provides for both instances of under-deterrence and over-deterrence. This Note proposes a solution that stabilizes these extremes around the optimal level of deterrence.[121]

There is a need for additional clarity and a unified source of regulatory guidance on OCIs.[122] As Ralph C. Nash Jr. has stated "[s]ince the FAR Council has apparently made no effort

2011, 2011 CPD ¶ 154 ("the FAR expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion"); *L-3 Services, Inc.*, B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171 ("Because conflicts of interest may arise in situations not specifically addressed in FAR Subpart 9.5, individuals need to use common sense, good judgment, and sound discretion when determining whether a potential conflict exists.").

[117] *See* Schooner, *supra* note 17, at 109 ("[I]mproper obsession with risk avoidance can suffocate creativity, stifle innovation and render an institution ineffective."); Sec. Robert M. Gates, *Submitted Statement to Senate Armed Services Committee*, at 10 (Jan. 27, 2009) (describing a "risk-averse culture" as an example of "entrenched attitudes throughout the Government" which "are particularly pronounced in the area of acquisition.").

[118] *Guidehouse LLP*, B-419848.3, et al., 2022 CPD ¶ 197, at 2 (Comp. Gen. June 6, 2022) (sustaining bid protest that the awardee had a disqualifying OCI). *See* Daniel I. Gordon, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L. J. 489, 510 (2013) (discussing a high number of sustained bid protesters related to OCIs).

[119] *See, e.g.*, *CACI, Inc., et al*., B-413860.4, et al, 2018 CPD ¶ 17, at 1 (Comp. Gen. Jan. 5, 2018) (denying a protest alleging that the agency's waiver was improper because the waiver was not issued until after award); *AT&T Government Solutions, Inc*., B-407720, et al., 2013 CPD ¶ 45 (Comp. Gen. Jan. 30, 2013) (dismissing a protest as academic when the agency waived the OCI after GAO's outcome prediction determined that the agency's ineligibility determination was unreasonable).

[120] *See* sources cited *supra* note 119 (providing examples of last minute waiver); discussion *supra* note 47 (describing the importance of competitive integrity).

[121] *See infra* Part III.

[122] *See* discussion *supra* Section I.A; FAR 2.101 (2023); FAR 9.505 (2019); *Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995) (GAO's three categories).

to clarify the regulation, the primary guidance is in the decided cases . . . . That is not a happy state of affairs."[123] A prime example of this unhappy state of affairs is the case of *NetStar-1 Government Consulting, Inc. v. United States*.[124] There, the protester, NetStar-1 Government Consulting ("NetStar") and the awardee, ALON, Inc., ("ALON"), both had potential conflicts of interest because their work under other contracts with the same agency, Immigration and Customs Enforcement ("ICE"), gave them access to competitively useful documents.[125] ICE, pursuant to the Homeland Security Acquisition Regulation ("HSAR"), included a standard OCI clause specific to the Department of Homeland Security, that required contractors to either

> (i) certify that, to the best of their knowledge, they were not aware of any facts which create an actual or potential organizational conflict of interest (OCI) related to award of the contract; or (ii) include in its proposal all information regarding the OCI and provide a mitigation plan if the vendor believed that the OCI could be avoided or neutralized.[126]

Both NetStar and ALON certified that they were not aware of any facts which might create an actual or potential conflict of interest.[127] The Court of Federal Claims would later disagree in a decision affirmed by the Federal Circuit.[128]

The NetStar case shows how the lack of clarity in the current OCI guidance can lead to undesirable results and unnecessary costs and delay for both the Government and contractors. The agency initially awarded the contract to ALON on September 15, 2010.[129] The Federal Circuit did not affirm the Court of Federal Claims injunction until August 9, 2012.[130] Thus, the NetStar case is an example of how inadequate OCI guidance can lead to a period of multiple

[123] Nash, *supra* note 19, at 8.
[124] 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012).
[125] *Id.*
[126] *Id.* at 515.
[127] *Id.* at 515.
[128] *Id.* at 520.
[129] *Id.* at 516.
[130] *Id.*

years where contracts are unperformed or enjoined.[131] Further, this case shows just how confused contracting officers, contractors, GAO, and the courts are by the current OCI guidance. First, neither contractor identified the potential OCI at the time of submitting their offer, and instead certified that they did not know of any fact giving rise to a potential OCI.[132] The contracting officer, with access to the offers and the existing ICE contracts, did not identify the potential conflict.[133] Then, once the conflict was identified by the GAO, the contracting officer simply approved the mitigation plans, without giving the conflict any meaningful consideration.[134] Finally, GAO would find there was no OCI and the Court of Federal Claims and Federal Circuit found the opposite.[135] The inconsistency in interpreting the ambiguities of the existing guidance is indeed an unhappy state of affairs.[136]

B. 2011 Proposed Solutions Are a Helpful Starting Point but More is Needed to Address the Current Inadequacies

While the 2011 solutions would have helped to address some of these gaps, the current realities of federal contracting are different than they were in 2011 and blanket adoption of the 2011 regulations would therefore be a mistake.[137] The FAR Council should consider how the 2011 proposed reforms can serve as a basis for updated guidance, but must also bear in mind the important changes in the field of federal procurement in the last decade.[138] The legislative debate

[131] It does appear that NetStar provided the services under the contract for some of the delay. *Id.* at 517, n. 7 ("NetStar, which was the incumbent on a prior related contract, provided the services in question under a bridge contract that expired September 28, 2011.").
[132] *Id.* at 515.
[133] *Id.* at 521.
[134] *Id.* at 526.
[135] *Id.* at 517.
[136] Nash, *supra* note 19, at 8.
[137] *See generally* Burd, *supra* note 18 (arguing that the 2011 OCI reforms are longer appropriate due to changes such as the *Turner Construction Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011) "hard facts" decision, agencies embracing the authority to waive OCIs, more prevalent use of OCI-specific contract terms and conditions, and defense industry spin-offs).
[138] *See supra* Section I.B (describing increased government outsourcing)

preceding the passage of the recent Preventing OCIs Act indicates that Congress intended for the FAR Council to pick up where the 2011 proposed rules left off.[139] Specifically, Senator DeSaulnier, referred to the 2011 proposed rules and explained the Preventing OCIs Act "requires the revisions that were then started to be completed."[140]

Although the distinction the 2011 proposed rule makes between OCIs that impact Government business risks and those that impact the fairness of the competitive process is well-founded, one important aspect of the 2011 proposed reforms that has received much debate is the proposal to move OCI guidance form FAR Part 9 Contractor Qualifications to FAR Part 3 Improper Business Practices and Personal Conflicts of Interest.[141] Commentators argued that the 2011 proposed reforms were contradictory in this aspect, as this move from FAR Part 9 to Part 3 implies that OCIs should be analyzed under an anticorruption framework but the other aspects of the proposed rule focus on the implication that OCIs are not necessarily corrupt.[142] A revised solution needs to adequately reconcile these two competing assumptions.

III. The Solution: Updated, Adequate, and Clear Guidance

To address the current confusion and undesirable outcomes of the FAR's guidance on OCIs, the FAR Council should revise the FAR to include adequate guidance that equips contracting officers with the necessary tools to navigate the complex OCI landscape that is the reality of modern contracting. While the Preventing OCIs Act requires that the FAR Council revise the FAR's OCI guidance, the statute offers very little specific guidance.[143] This Part

[139] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[140] 168 CONG. REC. H9837-01 (2022) (statement of Sen. DeSauliner).
[141] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). For a discussion of this proposed change see Yukins, *supra* note 36, at 2-4; Jurich, *supra* note 58, at 251.
[142] Yukins, *supra* note 36, at 3.
[143] Preventing Organizational Conflicts of Interest in Federal Acquisition Act. *See supra* Section I.C.

proposes specific solutions that the FAR Council should adopt to respond to the concerns with the current OCI guidance identified both in this Note and in the Congressional action leading up to the Act.

These solutions, however, are provided under the assumption the FAR Council will, at a minimum, also provide the necessary standard provisions and clauses mandating contractor disclosure of potential OCIs and updated definitions and examples required by the Preventing OCIs Act.[144] These standard provisions and clauses are essential to ensuring contractor disclosure of potential conflicts and the following proposed solutions rely upon such disclosure to effectively address OCIs. Without mandatory disclosure by contractors, both early in the competitive process and throughout the performance of the contract, agencies will be unable to effectively identify and address significant potential conflicts of interest.[145] Provisions and clauses requiring mandatory disclosure by contractors are therefore essential to the vitality of revised OCI guidance. Importantly, as the Act recognizes, these provisions and clauses should be tailored by the contracting officer in each case to account for the nuances of the particular procurement.[146] As a practical matter, ongoing mandatory disclosure may impose burdens upon the contractor but the contractor, rather than the government, is in the best position to identify and disclose potential conflicts of interest for two reasons. First, there may be instances where the information necessary to identify the conflict is solely within the possession of the contractor. For example, the Government would be less likely than McKinsey to have the necessary information to identify the potentially conflicting work resulting from McKinsey's consulting with large pharmaceutical companies.[147] Second, many large consultant firms and similar

[144] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[145] *See infra* Section III.A.
[146] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[147] *See supra* notes 2-11 and accompanying text.

businesses already have large and complex monitoring systems for conflicts of interest, similar to large law firms.[148] These baseline provisions required by the Act establish the foundation for this Note's proposed guidelines."

The updated guidance should first identify the distinction between conflicts of interest that pose a business risk to the Government ("business risk OCIs") and those that threaten the fairness of the competitive process ("competitive integrity OCIs"). Second, the updated guidance should separate the two types of OCIs by moving guidance for competitive integrity OCIs to FAR Part 6, Competition Requirements, and keeping business risk OCIs in FAR Part 9, Contractor Qualifications. Finally, the updated guidance should presumptively prohibit waiver of competitive integrity OCIs while providing agencies with guidance in performing the tradeoff between business risk and expertise in business risk OCIs. This Part discusses these proposed solutions in more detail.

A. Distinguishing Between Business Risk and Competitive Integrity OCIs

Revised FAR guidance should distinguish between OCIs that involve concerns of Government business risk and OCIs that involve concerns of risk to the integrity of the competitive process because these concerns implicate different risk and therefore can be mitigated, or waived, differently. This is similar to the distinction proposed by the 2011 solutions, and reflected in FAR 9.505's statement of guiding principles for OCI regulation.[149] The Preventing OCIs Act[150] directs the FAR Council to provide definitions of the *Aetna*

[148] *See, e.g.*, *Codes of Professional Conduct*, MCKINSEY & CO., https://www.mckinsey.com/about-us/social-responsibility/code-of-conduct (last visited Apr. 6, 2023).
[149] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). *See* Jurich, *supra* note 58, at 251 (discussing the proposed rule's distinction); FAR 9.505 (2019) (defining the two "underlying principles" of OCI policy as "[p]reventing the existence of conflicting roles that might bias a contractor's judgment" and "[p]reventing unfair competitive advantage").
[150] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.

categories,[151] which are not currently mentioned in the FAR.[152] Revised FAR guidance should define these categories in a manner that gives effect to the FAR's core distinction between and OCIs that only pose a business risk to the Government, traditionally impaired objectivity OCIs, and OCIs that threaten the integrity of the competitive process, traditionally biased ground rules and unequal access to information OCIs.[153] These two different concerns should lead to different treatment by agencies because business risk OCIs impact primarily the Government's interests whereas OCIs that involve risks of unfair competition impact the interests of other offerors, in addition to the Government's interests.[154] While most OCIs involve a conflict between two or more government contracts like NetStar,[155] in OCIs that involve a conflict with a contractor's private sector contract, such as McKinsey's conflict,[156] there may be impacts of a business risk OCI upon the interests of the other party to the contractor's private-sector contract as well.[157] These third-party interests, such as those of the large pharmaceutical companies in the McKinsey case, could be considered as part of the Government's interests for the purposes of OCI analysis. For example, in the McKinsey case, the FDA could have considered its interest in successful contract performance as well as the potential broader effects through any influence McKinsey's simultaneous contracting may have through performance of the contracts with pharmaceutical companies. These third-party concerns, however, would be best addressed between the contractor and the third-party.

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[151] *Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995).
[152] *See supra* Section I.A.
[153] FAR 9.505 (2019).
[154] For a discussion of these two different concerns see Christopher R. Yukins, *supra* note 36, at 4.
[155] *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *supra* notes 124-135.
[156] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1.
[157] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1.

Specifically, business risk OCIs involve the Government's competing interests between the business risk of biased advice and the benefit of the contractor's expertise through additional experience, as recognized in FAR 9.505(a)'s underlying principle of "[p]reventing the existence of conflicting roles that might bias a contractor's judgment".[158] Competitive integrity OCIs do not, however, involve such competing interests. Rather, the conflict that arises when a contractor has unequal access to competitive information or is involved in the creation of the acquisition strategy for a contract that same contractor is competing for, does not directly implicate the Government's business risk in receiving biased advice.[159] Competitive integrity OCIs address the FAR's second underlying principle of "[p]reventing unfair competitive advantage."[160] The negative impact is directly on the fairness of the competitive process because the competitor with the unequal information or involvement in the acquisition support has an undue advantage in competing for the contract.[161] Further, there is typically no benefit of added expertise that arises directly from the conflict when the conflict is one of competitive integrity.[162] While it may still be the case, in some instances, that the offeror with a competitive integrity OCI is otherwise the best value for the government, this will not systematically be true, as with business risk OCIs where the conflict arises out of the specific experience that the government is seeking in this sector.[163]

For example, under this Note's proposed solution, McKinsey's conflict of interest in performing work for the FDA and large pharmaceutical companies would be categorized as a

[158] FAR 9.505(a) (2019).
[159] For an example see the *NetStar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. 511, case discussed *supra* notes 124-135.
[160] FAR 9.505(b) (2019).
[161] *Id.*
[162] For an example see *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511.
[163] *See supra* note 18 and accompanying text.

business risk OCI.[164] McKinsey's conflict gave McKinsey no undue advantage that threatened the integrity of the competitive process.[165] Rather, the threat was to the Government in receiving biased consulting services that undermined successful contract performance.[166] There are competing concerns between this potential business risk and the benefit to the Government of McKinsey's experience in this sector.[167] This Note proposes that this concern should be treated differently from a concern regarding the integrity of the competitive process because the Government is in a better position to address the competing concerns raised in a business risk OCI.[168]

Conversely, ALON's conflict of interest in the *NetStar* case would be categorized as a competitive integrity OCI under this Note's proposed solution because that OCI arose from ALON's unequal access to competitive information that gave ALON an undue advantage in competing for the contract.[169] This threat to competitive integrity does not pose any concurrent business risk to the Government but is a violation of the procurement system's core requirement of full and open competition.[170] OCIs that only provide an undue competitive advantage are particularly sensitive because it is not the Government's own interests as a consumer that are at stake, but rather the interests of other offerors in having a fair opportunity to compete for the resulting contract.[171]

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[164] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 3-5.
[165] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40.
[166] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40.
[167] *See supra* note 18 and accompanying text.
[168] *See infra* Section III.C.
[169] *See supra* notes 127-129 and accompanying text; *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 520 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012).
[170] *NetStar-1 Gov't Consulting, Inc*, 101 Fed. Cl. at 520.
[171] *See supra* notes 42-49 and accompanying text.

Importantly, not all conflicts of interest will fit neatly into these categories. In fact, as with the current *Aetna*[172] categories, many conflicts of interest will pose a risk both to the Government's business interests and to the competitive process.[173] This solution does not ignore this overlap. Under this proposal, any conflict of interest that poses any risk of competitive integrity is a competitive integrity OCI, regardless of whether there is also concurrent business risk to the Government. A business risk OCI must be a conflict that *only* poses business risk to the Government without any concurrent risk of undue advantage in the competitive process. In other words, a business risk OCI may not also pose a risk to competitive integrity, but a competitive integrity OCI may or may not also involve concurrent business risk. For example, under this proposed framework, the OCI in *The Jones/Hill Joint Venture*,[174] where the awardee consulted on the drafting of the performance work statement and then prepared the management plan for in-house performance, would be considered a competitive integrity OCI because both unequal access to information and biased ground rules OCIs pose a risk to the fairness of the competitive process rather than a risk of unsuccessful contract performance due to contractor bias.[175]

A business risk OCI, such as the McKinsey case, may initially seem to be most concerning given that business risk OCIs may lead to a risk of biased contract performance. The Government, however, is in a better position to accept the risks of a business risk OCI.[176] Unlike

[172] *See supra* notes 24-25 and accompanying text.
[173] *See, e.g.*, *The Jones/Hill Joint Venture*, B- 286194.4 et al, 2001 CPD ¶ 194 (Comp. Gen. Dec. 5, 2001), at 10, modified on reconsideration by *Dep't of the Navy—Reconsideration*, B-286194.7, 2002 CPD ¶ 76 (Comp. Gen. May 29, 2002) ("the record is consistent with the circumstances attendant to both "unequal access to information" and "biased ground rules" conflicts of interest.").
[174] B- 286194.4 et al, 2001 CPD ¶ 194 (Comp. Gen. Dec. 5, 2001), modified on reconsideration by *Dep't of the Navy—Reconsideration*, B-286194.7, 2002 CPD ¶ 76 (Comp. Gen. May 29, 2002)
[175] *Id.* at 10.
[176] *See* Hilary S. Cairnie & Dena S. Kessler, *Organizational Conflicts of Interest*, 12-13 BRIEFING PAPERS 1, 14 (Dec. 2012) (discussing how the 2011 proposed rules "expressly contemplate agency acceptance of risk due to a conflict"); Yukins, *supra* note 36, at 4 (discussing the 2011 proposed rule's approach to impaired objectivity OCIs).

competitive integrity OCIs, which primarily affect the procurement system's core focus of full and open competition, business risk OCIs involve a risk of unsuccessful contract performance, similar to other risks that the Government expressly accepts and rejects through selection of a best-value tradeoff.[177] The interest in competitive integrity is distinct in that it involves the interests of both the Government and the contractor. Further, the procurement system places a high value on competitive integrity because of the theory that doing so will yield the best value for the Government through the forces of the competitive market.[178] If this core policy goal of competitive integrity is undermined it will hinder the Government's ability to obtain the best value.[179] Importantly, for the Government to be able to fully evaluate the potential risk of unsuccessful contract performance, the mandatory disclosure provisions and clauses required by the Preventing OCIs Act are essential.[180] These provisions and clauses ensure that the Government has the necessary information regarding a potential OCI, especially when that information is entirely within the control of the contractor.[181] Once the Government has access to such information, the Government can evaluate the potential risk of unsuccessful contract performance to determine whether mitigation or waiver is in the Government's interest.[182] If the risk is to competitive integrity, and not to unsuccessful contract performance, such as in a

[177] *See generally* FAR Part 15 Contracting by Negotiation. For a discussion of the importance of full and open competition in the procurement system see *supra* notes 46-48 and accompanying text.
[178] *See* Schooner, *supra* note 17, at 104 (describing competition, as a core principle of the U.S. procurement system and explaining that such a principle is based upon Adam Smith's theory that individuals pursuing their self-interest in the marketplace will result in better outcomes for all market participants) (citing Adam Smith, *The Wealth of Nations* (ed. Edwin Canaan, University of Chicago Press, 1976)).
[179] *Id.* at 104; *see supra* notes 46-48 and accompanying text.
[180] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[181] *See supra* notes 60-63 and accompanying text (discussing the current guidance regarding solicitation provisions and contract clauses that address OCI disclosure); STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 34-49 (discussing McKinsey's failure to disclose its potential conflicts); *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 520-524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (stating that the agency should have required the contractor to disclose additional information in order to identify the potential conflict earlier).
[182] *See* Yukins, *supra* note 36, at 4; *infra* Section III.C.

competitive integrity OCI, the individual agency is not in a position to undermine the procurement's system core requirement of full and open competition in the same way it can accept a risk of unsuccessful contract performance that is in the Government's best interest.[183] Therefore, revised guidance should distinguish between OCIs that pose a risk to successful contract performance and those that threaten the integrity of the competitive process.

B. Where in the FAR?

In addition to distinguishing between business risk OCIs and competitive integrity OCIs, revised FAR guidance should address the issue of where such guidance is placed within the FAR, as was raised in the 2011 proposed solutions.[184] Specifically, the FAR Council should move competitive integrity OCIs to FAR Part 6,[185] which addresses Competition Requirements, and keep business risk OCI guidance in FAR Part 9,[186] which addresses Contractor Qualifications. This difference in FAR placement represents the different concerns among competitive integrity and business risk OCIs.[187] Competitive integrity OCIs are a matter of competition because the contractor's undue competitive advantage threatens CICA's core requirement of full and open competition.[188] Business risk OCIs—which primarily involve a risk of unsuccessful contract performance through the provision of biased advice—are best understood as a matter of contractor qualification.[189] This is because the Government is in the best position to determine, based upon information disclosed by the contractor, as required by the updated clauses the Preventing OCIs Act direct the FAR to include, whether—despite the

[183] *See* Yukins, *supra* note 36, at 4; *infra* Section III.C.
[184] *See supra* notes 141-142 and accompanying text; Yukins, *supra* note 36, at 3.
[185] FAR Part 6 Competition Requirements.
[186] FAR Part 9 Contractor Qualifications.
[187] *See* Yukins, *supra* note 36, at 1-2 (explaining how OCIs grew out of a concern for unequal access to information but have since shifted to impaired objectivity OCIs).
[188] 41 U.S.C. § 3301.
[189] *See* FAR 9.000 (2022) (describing the role of FAR Part 9).

conflict—the contractor is still qualified to perform the contract successfully.[190] Moving FAR guidance that directly implicates competitive concerns to Part 6, and maintaining FAR guidance that involves business-type determinations by the Government in Part 9, will ensure that agencies are approaching different types of OCIs with the correct approach based upon the different issues that are being considered.

C. To Waive or Not to Waive?

In addition to these changes, revised FAR guidance should allow agency personnel to exercise their business judgment in determining whether to waive a business risk OCI but should presumptively prohibit waiver of competitive integrity OCIs. This is because the Government, as the purchaser, and recipient of the product or service, is able to accept a certain level of business risk in exchange for superior expertise or experience when evaluating a business risk OCI.[191] However, the Government should not waive OCIs that pose a risk to competitive integrity because CICA's requirement of full and open competition is too central to the U.S. procurement system to waive in individual conflicts absent unusual and compelling circumstances.[192] The procurement system places an extraordinarily high value on full and open competition because of the central capitalist theory that individuals zealously pursuing their own self-interests in a competitive market will result in better outcomes for all market participants.[193]

To assist agencies in addressing OCIs, revised FAR provisions should include the following guidance in determining whether waiver of a business risk OCI is in the Government's

[190] For a discussion of the risks of "impaired objectivity OCIs" see Yukins, *supra* note 36, at 4.
[191] Cairnie & Kessler, *supra* note 176, at 14.
[192] 41 U.S.C. § 3301; *see supra* notes 46-48 and accompanying text (discussing the importnace of competitive integrity to the procuremetn system).
[193] 41 U.S.C. § 3301; *see supra* notes 46-48 and accompanying text (discussing the importnace of competitive integrity to the procuremetn system).

best interest. The FAR should direct agency personnel to balance the impact of the potential conflict on the risk of unsuccessful contract performance with the benefit provided by the potentially conflicted contractor's business expertise, experience, or technical solution. If the benefit of the contractor's expertise, experience, or technical solution exceeds the risk of unsuccessful contract performance created by the potential conflict, then the agency should waive the OCI. Whereas, if the risk exceeds the benefit of the expertise, then the agency should not waive the OCI and the contracting officer should use other tools to avoid, neutralize, or mitigate, the conflict.

The guidance should also provide the agency with factors to consider in analyzing whether waiver of a business risk OCI is in the Government's best interest. Such factors should include the context and impact of the potential conflict, whether other contractors who may not have similar conflicts possess the requisite experience and expertise, as well as the type of contract and the impact impaired objectivity may have on successful contract performance. These factors should be illustrative, rather than exclusive and should provide the agency with tools for exercising discretion rather than overriding such discretion. The guidance should require that agencies document their waiver decision.

Thus, where there appears to be a conflict but the potential for unsuccessful performance is low, the contracting officer may exercise discretion to waive the conflict. Similarly, if there is a substantial risk but an opportunity for mitigation, the contracting officer could waive and mitigate the conflict. Notably, in many instances, such as McKinsey's headline grabbing potential conflict, the conflict will still be too serious and the impact too great for the contractor

to do so, but the Government is in the best position to make such a determination.[194] However, mandatory disclosure is therefore even more important in making contracting officers aware of potential conflicts and allowing them to adequately evaluate and address them.[195]

In a case like *Safal Partners, Inc.*, where the initial awardee's subcontractor had a potential conflict in that it could financially benefit by recommending grant recipients to the program it administered under another contract with the agency, the Government may be able to accept such a risk of unsuccessful performance.[196] While this analysis necessarily depends on the facts and circumstances of each case, in applying the above factors, the contracting officer could determine that the contractor's expertise and experience on this subject outweighs the minimal risk of unsuccessful contract performance, especially considering the attenuated subcontracting relationship as well as the fact that the agency retains final decisional authority.[197] The agency could also determine that the opportunity for firewalls and other mitigation techniques could present an opportunity for mitigating any potential conflict.[198] OCI guidance that allows for a discretionary approach to the different risks posed by different types of OCIs and provides guidance to contracting officers on how to exercise such discretion, is needed to address the complexities of modern federal acquisitions.

Conversely, the FAR guidance should establish a rebuttable presumption that competitive-integrity conflicts are non-waivable. Given that waiver of competitive integrity conflicts would essentially waive CICA's core requirement of full and open competition,[199] such

[194] *See* STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40-50 (discussing how McKinsey's conflict of interest influenced policy documents submitted to Government agencies).
[195] *See* discussion *supra* note 181 (explaining the importance of mandatory disclosure).
[196] *Safal Partners, Inc.*, B-416937, 2019 CPD ¶ 20, at 9-10 (Jan. 15, 2019); *see supra* notes 103-107 and accompanying test.
[197] *Safal Partners, Inc.*, 2019 CPD ¶ 20, at 9-10.
[198] *See supra* note 57 and accompanying text (discussing mitigation of OCIs).
[199] 41 U.S.C. § 3301.

conflicts should not be waived lightly. Given that a bright-line rule may not account for the facts and circumstances of each individual case, the presumption of non-waiver should still be rebutted if there is an unusual and compelling reason,[200] approved by a senior agency official, and documented through a determination and findings. Therefore, the *NetStar* conflict, likely could not be waived because the awardee's access to nonpublic competitively useful information gave it an undue competitive advantage that undermines the procurement system's core focus on full and open competition.[201] This framework will equip agencies to exercise discretion in cases where only the Government's business interests are implicated while preserving contractors' interest in a fair competitive process.[202]

Conclusion

Current OCI guidance is outdated and inadequate. Without updates that reflect the modern realities of a "blended workforce" contractors and the government are left figuring it out themselves. This situation has led to over-deterrence of potential conflicts that could have been waived or mitigated and under-deterrence of potential conflicts that are either not identified or are waived. Congress, reacting to headlines of McKinsey's potential conflicts, has directed the FAR Council to issue revised guidance. A deeper review of the potential conflicts that arise daily but draw little attention reveals that the issues resulting from outdated and inadequate guidance are much more nuanced. It is first essential that the FAR Council avoid the inaction resulting from the 2011 solutions and enact revised guidance that provides a clear framework for

[200] While the guidance need not provide an exhaustive list of all potential reasons examples might include there being only one responsible source to meet the Government's needs or a mandatory source under the AbilityOne or similar program. *See* FAR 6.302-1 (2015) (providing guidance for when there is "[o]nly one responsible source and no other supplies or services will satisfy agency requirements."); FAR Part 8 (discussing mandatory sources).
[201] *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *supra* notes 124-135 and accompanying text.
[202] *See supra* Section I.A (discussing these two distinct concerns).

contracting officers and mandatory disclosure requirements. In adopting such a framework, the FAR Council should effectuate the core distinction between competitive integrity and business risk OCIs. This proposed solution would ensure contracting officers are equipped to obtain the best value for the government and avoid the issues of both over and underdeterrence in current OCI guidance.

ETHAN SYSTER
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The following writing sample is a memorandum I prepared for a Board Judge as part of my externship with the U.S. Civilian Board of Contract Appeals (CBCA). The CBCA hears disputes between government contractors and civilian federal executive agencies pursuant to the Contract Dispute Act, 41 U.S.C. §§ 7101-7109. This memorandum analyzes the applicability of various clauses to a dispute over a delay in a construction contract and was prepared to assist a Board Judge in preparing for mediation between the parties. The Board Judge has given me permission to use this memorandum in its redacted form as a writing sample. I did not receive assistance in preparing this memorandum and the work is entirely my own.

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MEMORANDUM

To: Board Judge

From: Ethan Syster

Date: September 30, 2022

Subject: *[Contractor] v. [U.S. Agency]*, CBCA XXXX

Question(s) Presented

Whether the contractor is entitled to the costs it claims under either the Administrative Leave clause or the Suspension of Work clause?

Brief Answer

The contractor is not entitled to costs under either the Administrative Leave clause or the Suspension of Work clause because the facts do not indicate that the Government's action or inaction led to an order to suspend work or to the granting of administrative leave. The only likely claim for costs would be under a constructive acceleration theory arising from the Excusable Delays clause but this is also not a strong claim because the contractor has not shown any refusal to grant an extension or other coercive pressure by the Government

Background

On, October 7, 2015, [Contractor] was awarded a fixed-price construction contract to build a [government building].[1] Appellant's Notice of Appeal, Claim XX at 1 (hereinafter "Claim XX"). The contracting officer issued a Limited Notice to Proceed on February 26, 2016, with a 30-month Period of Performance and a Contract Substantial Completion Date of August 26, 2018. *Id.* at 1.

A security alert was issued on October 19, 2017, related to civil unrest near the worksite. Claim XX, Reference 01. That afternoon, [Contractor]'s employees at the worksite were dismissed early due to the security concerns. Claim XX at 1. The parties dispute who ordered the early release and shutdown of the worksite, but a "Site Event Report" prepared by [Contractor]'s construction security manager summarizes the decision-making process. The security manager explains that at 16:00 the "looters were next to our site." Exhibit 8. Following gunfire, "the decision was made by the Project Director to stop the work . . . and bring the workers down to the ground level." *Id.* Around 16:40, the security manager ensured the area was clear so that employees could be safely evacuated. *Id.* All employees were offsite at 17:27. *Id.* The workday typically ends at 18:00. Exhibit 7 at 3. A project manager of a subcontractor expressed concern that, if the decision to leave the worksite early was made by [Contractor], rather than the Government, "idle resources may not be compensable." *Id.* The security manager responded with the Site Event Report and explained in the body of the email "while the decision was made by [project manager] and I, there was coordination with [the agency]." Exhibit 7 at 2.

While not explicitly addressed in the claim or the contracting officer's final decision, it can be inferred that [Contractor] employees resumed work at their regularly scheduled time on the morning of October 20, 2017. Later on the morning of October 20, the contracting officer's representative ("COR") emailed [Contractor]'s project manager "FYI-We are following Security guidance and closing the site at 11:00." Claim XX, Reference 02. The project manager responded "Acknowledged. [Contractor] reserves its right to claim ½ day lost time due to civil unrest." *Id.* To which the COR responded with "it is your right in accordance with the contract." *Id.*

[Contractor] submitted a claim for $XX,XXX as direct and indirect costs resulting from the "[G]overnment-ordered site shut-down and administrative leave." Claim XX.

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[1] Dates and party names have been altered to preserve confidentiality.

[Contractor] points to subsection H.X[2] of the contract which states "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor."

The contracting officer issued a final decision denying [Contractor]'s claim. Appellant's Notice of Appeal, Contracting Officer's Final Decision. The contracting officer emphasizes several clauses which put the risk of changed security conditions on the contractor, rather than the Government. *Id.* at 2. The contracting officer points to FAR 52.225-19, which provides that "Contract performance may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations." The contracting officer asserts that the claim should be properly analyzed under the Suspension of Work clause, FAR 52.242-14, which would entitle the contractor to an adjustment for unreasonable delays caused by the Government. In addition, the contracting officer found that, even if [Contractor] were entitled to costs, its claimed damages were calculated inaccurately. Contracting Officer's Final Decision at 3. This memorandum does not address the issue of cost calculation.

Discussion

[Contractor] asserts that the claim should be analyzed under the Excusable Delays and Administrative Leave clauses, which could potentially lead to contractor recovery of direct and indirect costs related to the granting of administrative leave. Conversely, the agency argues that the claim should be analyzed under the Suspension of Work clause, which would entitle the contractor to time, not money. As further explained below, the Excusable Delays and Administrative Leave clauses provide no basis for recovery because there was no constructive acceleration nor any granting of administrative leave. Under the Suspension of Work clause, [Contractor] also likely cannot recover because there was no unreasonable delay caused by the Government.

As an initial matter, [Contractor] argues that the e-mail conversation between [Contractor]'s project manager and the COR guarantees the contractor's recovery. Generally, the Government is only bound by actual authority and not apparent authority. *See HTC Industries, Inc.*, ASBCA 40562, 93-1 BCA ¶ 40,562 (Oct. 30, 1992). (contractor denied recovery where the contracting officer's technical representative acted outside of their actual authority). As stated above, [Contractor] acknowledged the COR's guidance to close the site at 11:00 and responded "[Contractor] reserves it right to claim ½ day of

[2] Contract clauses have been replaced with fictitious pseudonyms to preserve confidentiality.

lost time due to civil unrest." Reference 02. The COR replied "it is your right in accordance with the contract." Reference 02. It is not clear that the e-mail correspondence supports the interpretation that [Contractor] is asserting. Rather, as the contracting officer's final decision describes, the e-mail conversation seems to logically imply that [Contractor] reserved its right under the contract to file a claim for additional time. Contracting Officer's Final Decision at 3. Regardless of the interpretation of this e-mail exchange, it is not dispositive because the language of the contract, and not the COR's interpretation, determines the contractor's entitlement. Thus, the email exchange does not provide [Contractor] with an independent basis for recovery beyond what is provided in the contract.

I. Excusable Delays and Administrative Leave Clauses

The Excusable Delays and Administrative Leave clauses do not entitle the contractor to recover any amount of money because there was no constructive acceleration or granting of administrative leave. The Excusable Delays clause provides that "the Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10." F.X.X. Examples of excusable delays include situations such as natural disaster and Government action:

> (1) acts of God or the public enemy; (2) acts of the United States Government in either its sovereign or contractual capacity; (3) acts of the Government of the host country in its sovereign capacity; (4) acts of another contractor in the performance of a contract with the Government; (5) fires; (6) floods; (7) epidemics; (8) quarantine restrictions; (9) strikes; (10) freight embargoes; and (11) unusually severe weather

The Excusable Delays clause provides that a travel warning or similar document will not, in itself, be sufficient to establish that a security condition prevented performance. F.X.Z.

In *Fluor Intercontinental, Inc. v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334, the Board found that the contractor, which had been awarded a firm-fixed price contract to design and construct an embassy compound in Haiti, had incurred an excusable delay when an ordered departure led to delays in contract performance. Specifically, the Board found that while the security conditions themselves did not constitute a change to the contract, the ordered departure was an excusable delay. *Id*. at 173,446. The Board granted costs for constructive acceleration because the contracting officer continually denied the contractor's excusable delay claim and impressed upon the contractor the need for completion with no extension due to excusable delays. *Id*. at 173,448.

Unlike in *Fluor Intercontinental, Inc.*, here there was no ordered departure and rather the situation upon which the contractor seeks to recover is much closer to the generalized security conditions the Board declined to find as changing the contract. The security conditions described, including the security alert, are similar to the "travel warning, warden message, or similar document or communication" described in F.X.Z as insufficient to constitute an excusable delay. The contract included two clauses placing the risk of changed security conditions on the contractor. *See* H.XX.Y.Z (placing responsibility on the offeror for "visiting the project site and verifying all pertinent site conditions, including the past, current, and future security conditions"); FAR 52.225-19 (noting that "Contract performance may require working in austere conditions" and requiring that "the Contractor accept the risks associated with required contract performance in such operations.") Therefore, the deterioration in security conditions likely does not constitute an excusable delay.

Constructive acceleration requires that the contractor first be faced with an excusable delay and then the Government threaten to terminate or refuse to grant, or delay granting, a time extension. *See Intersea Research Corp*., IBCA 1675, 85-2 BCA ¶ 18,058 (finding that agency threat to terminate the contract constitutes constructive acceleration); *Fluor International, Inc.* at 173,446 (finding that delay in granting a time extension following an excusable delay constitutes constructive acceleration). Even assuming there was an excusable delay, [Contractor] has not argued that there was any threat to terminate the contract, delay in granting a time extension, or other coercion by the Government that would lead to a claim for constructive acceleration.

[Contractor] also relies upon the Administrative Leave clause, which provides that, "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor." H.X.Y. The clause further states that the costs of such leave "shall be a reimbursable item of direct cost hereunder for employees whose regular time is normally charged, and a reimbursable item of indirect cost for employees whose time is normally charged indirectly in accordance with the contractor's accounting policy." Specifically, [Contractor] contends that the Government ordered the site shut-down and administrative leave in response to a security concern, which constitutes an excusable delay under F.X.X. To recover under the Administrative Leave clause, [Contractor] must show, (1) that security conditions are of the type described in the Excusable Delays clause and (2) that administrative leave was granted to contractor personnel. H.X.Y. A similar administrative clause has been interpreted in a case involving layoffs and furlough of contractor employees for a substantial period of time due to the Government's unavailability of funds. *See Raytheon STX Corp. v. Department of Commerce*, GSBCA 14926-COM, 00-1 BCA ¶ 30,632 (Oct. 28, 1999) (interpreting a similar Administrative

Leave clause in the context of a partial Government shutdown where the contractor sought layoff pay and salary costs for employees affected by the shutdown but ultimately awarding costs upon the cost-reimbursable nature of the contract).

The Government argues that contractor's employees, in working on a fixed-price construction contract, do not qualify as "assigned contractor personnel in Government facilities" under H.X.Z. Unlike the cost-reimbursable contract in *Raytheon STX Corp.*, here the workers' time is not charged to the Government, either directly or indirectly. However, this understanding would render the entire Administrative Leave clause in H.X inapplicable to the Contract and it is unclear why the Government would have included the clause in a fixed-price contract if it was completely inapplicable. Notably, the clause focuses upon "the contractor's accounting policy" rather than the Government's typical liability for paying the wages.

Assuming [Contractor] can show that there was an excusable delay, and that the Administrative Leave clause would apply to [Contractor]'s employees, the dismissal of employees for less than two full days of work as a result of security concerns likely does not constitute administrative leave. Unlike in *Raytheon*, here the employees were sent home temporarily for approximately seven to eight hours of working time as a result of deteriorating security conditions outside of the Government's control. Although the parties debate whether the termination of work was ordered by the Government or the contractor, nowhere in the claim or the contracting officer's final decision does either party address whether the Government specifically ordered that the employees be placed on administrative leave for this period. Thus, the Administrative Leave clause likely does not entitle [Contractor] to relief.

II. Suspension of Work Clause

The Suspension of Work clause is inapplicable because there was no Government-caused unreasonable delay. The Suspension of Work clause, FAR 52.242-14, provides that the contracting officer may suspend work for the convenience of the Government. If a suspension of work is of an unreasonable duration, an adjustment shall be issued for the increased cost of performance. *Id.* The clause specifically provides that no adjustment is to be made when the work is suspended by a cause other than the Government. These requirements are summarized in *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1375 (Fed. Cir. 2003). The Court found that must be a (1) delay of reasonable length, (2) proximately caused by the Government, (3) resulting in injury, and (4) no concurrent delay that is the fault of the contractor. *Id.*

The courts and boards have typically interpreted the first requirement regarding the reasonableness of the delay to focus upon the duration of the delay rather than the purpose of the delay. *See, e.g. BCPeabody Constructions Services Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013 (finding 179-day delay to be unreasonable); *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826 et al., 22-1 BCA ¶ 38,083 (finding 186-day delay to be unreasonable). As for the second and fourth requirements, the courts and boards have found a delay to be proximately caused by the Government's action or inaction when there is no concurrent delay that is the fault of the contractor. *See Melka Marine, Inc. v. United States*, 187 F.3d 1370 (Fed. Cir. 1999) (Government failure to obtain necessary permit); *BCPeabody Construction Services Inc*. (Government failure to prepare dining room for renovation by relocating patients); *B.V. Construction, Inc.*, ASBCA 47766, et al. 04-1 BCA ¶ 32,604 (Government failure to issue a contract modification authorizing payment for additional engineering work necessary to correct errors in Government's plans and specifications). Further, "only delay on a project's critical path results in overall delay." *CTA I, LLC*, at 184,949.

Here, the delay was not of an unreasonable duration. Unlike in *BCPeabody Construction Services, Inc.*, or *CTA I, LLC*, here the delay was less than two working days and was an appropriate response to the security conditions surrounding the worksite. In analyzing the second and fourth factors concurrently, [Contractor] has not shown that there was a Government-caused delay, rather than a delay caused by the acts of an external third-party. Unlike in *Melka Marine* where the Government failed to obtain a necessary permit, or in *BCPeabody Construction*, where the Government failed to relocate patients to allow contractor access to the worksite, here the delay was caused by the acts of third-party protestors. While the parties spend much time discussing whether the Government or the contractor ultimately determined that work should be suspended, such a determination is immaterial as to the proximate cause. Regardless of who made the ultimate decision, that decision was based upon the external actions of unaffiliated third parties who created the security concern. The contractor accepted the risk of varying security conditions and agreed with the COR that the conditions warranted temporary closure of the work-site. H.XX.Y.Z; FAR 52.225-19. *See also* Exhibit 8 (describing [Contractor]'s agreement with the Government to shut-down the site). Thus, the delays were caused by an unaffiliated third-party and [Contractor] likely cannot recover under the Suspension of Work clause because there was no unreasonable delay caused by the Government.

Questions

1. If, as the contracting officer asserts, the Administrative Leave clause (H.X(e)) is inapplicable to the contractor personnel, then why was it included in the fixed price contract?
2. How did the lack of work on these two days affect project completion time?
3. Did the contractor continue work on the morning of October 20, 2017?
4. How did the contractor calculate $XX,XXX in costs?
5. Is there any additional evidence regarding whether Government personnel ordered contractor personnel to leave?

Applicant Details

First Name	**Tiffanie**
Last Name	**Tagaloa**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**859-913-3635**

Applicant Education

BA/BS From	**Transylvania University**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Kentucky College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=61801&yr=2011**
Date of JD/LLB	**December 31, 2024**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Kentucky Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tiffanie Tagaloa

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18 - April - 23

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker:

Please consider my application for a clerkship in your chambers for the 2024-2025 term. I am currently a second-year law student at the J. David Rosenberg College of Law at the University of Kentucky and will graduate in December 2023. I would welcome the opportunity to learn from your experience not only as a judge, but also as a former assistant U.S. Attorney, a career I plan to pursue.

I am confident that I could contribute meaningfully to the U.S. District Court for the Eastern District Court's work in Virginia. As a member of the *Kentucky Law Journal*, I meticulously edited a wide-range of written scholarship on a plethora of legal topics and moderated a panel of professors for the *2022 Kentucky Law Journal Redistricting Symposium*. As an extern for Judge Minnifield in Kentucky's 22nd Circuit Court, I anticipate writing thorough and precise bench memoranda while simultaneously working on a pilot program to providing resources and support to system-involved young adults with the hopes of reducing recidivism rates.

Included are my resume, writing sample, and transcripts. My letters of recommendation will be sent separately. My recommenders are:

- **Melynda J. Price |** melynda.price1@uky.edu **|** (859) 257-1678 **|** *William L. Matthews, Jr. Professor of Law at the J. David Rosenberg College of Law at the University of Kentucky*
- **Beau Steenken |** beau.steenken@uky.edu **|** (859) 257-1578 **|** *Instructional Services Librarian & Professor of Legal Research at the J. David Rosenberg College of Law at the University of Kentucky*
- **Sarah Langer** | sdlanger17@gmail.com **|** (240) 577-8199 **|** *Staff Attorney at the Kentucky Department of Public Advoca*

I hope to have the opportunity to interview with you.

Respectfully,
Tiffanie Tagaloa

TIFFANIE E. TAGALOA

535 Bishop Dr., Lexington, KY 40505 · (859) 913-3635 · teta222@uky.edu

EDUCATION

University of Kentucky David J. Rosenberg College of Law
Juris Doctor expected May 2024

- Ollen B. Hinnant II Scholarship (*three years*)
- Edward M. and Josephine P. Davis Dean's Award (*most improved GPA- 1L*)
- *Kentucky Law Journal* Staff Editor and Source & Cite Award
- National Black Law Students Association CBM Mock Trial Competitor
- National Black Law Students Association NM International Negotiations Competitor
- Ninth Judicial Circuit Historic Society's ECAD 2023 Cohort

Transylvania University
Bachelor of Arts in Middle Grades Education, May 2016

- Morrison Scholarship (*four years*)

LEGAL EXPERIENCE

Kentucky's 22nd Circuit Court 7th Division, Lexington, KY
Judicial Extern to the Honorable Diane Minnifield, Summer 2023

ACLU, Louisville, KY
Legal Intern, Summer 2023

Mehr Fairbanks Trial Lawyers, Lexington, KY
Law Clerk, September 2022 to present

- Conduct legal research and draft legal memoranda
- Assist with trial preparation, depositions, and client meetings

Prof. Beau Steenken, UK College of Law, Lexington, KY
Legal Research Assistant, May 2022 to present

- Analyze and evaluate library and internet resources to find relevant court cases, empirical data, and administrative records

Kentucky Department of Public Advocacy, Lexington, KY
Legal Intern, Summer 2022

- Conducted legal research and drafted motions
- Assisted with trial preparation, investigations, and arraignments

OTHER EXPERIENCE

Conduent, Lexington, KY
Reimbursement Review Services Associate III, May 2020 to May 2021

Conifer Health Solutions, Lexington, KY
Patient Access Registration II, December 2019 to May 2020

Cory Booker for President Campaign, Reno, NV
Field Organizer, Winter 2019

Fifth Third Bank, Lexington, KY
Disputes Resolution Analyst I/CDAC Client Advisor, January to July 2019

Nevada Coordinated Campaign, Reno, NV
Field Organizer, Summer to Fall 2018

Fayette County Public Schools, Lexington, KY
English Language Arts Teacher/Reading Intervention Specialist, Aug. 2016 to May 2018

UNOFFICIAL

University of Kentucky

Name: Tagaloa, Tiffanie Evalani
Student SSN: *****1894
Student Number: 10866184
Print Date: 03/11/2023 **Page Number:** 1 of 1

UNOFFICIAL TRANSCRIPT

To order an official transcript, go to: myUK > myRecords > Official Transcripts

To view this information online, go to: myUK > Degree Planning and Registration > Menu > Academic History

Requested by: Tiffanie Evalani Tagaloa

Law Academic Record

SCHOOLS ATTENDED
Secondary Schools:
Bryan Station Senior High Sch
Higher Education Institutions:

Transylvania University	07/2021 - 07/2021
Transylvania University	06/2021 - 06/2021
Transylvania University	05/2021 - 05/2021

2021 Fall Semester

Program:
College of Law
Juris Doctor
Major: Law

CRS NUM	COURSE TITLE	GRADE	HOURS	QPTS
LAW 805	TORTS	B	4.0	12.00
LAW 810	CRIMINAL LAW	B-	3.0	8.10
LAW 815	CIVIL PROCEDURE I	C	3.0	6.00
LAW 804	LEGAL RESRCH & WRITING SKILLS	S	0.0	0.00
LAW 801	CONTRACTS/SALES I	C	3.0	6.00

	AHRS	EHRS	QHRS	QPTS	GPA
Semester	13.0	13.0	13.0	32.10	2.469
Cumulative	13.0	13.0	13.0	32.10	2.469

2022 Spring Semester

CRS NUM	COURSE TITLE	GRADE	HOURS	QPTS
LAW 807	PROPERTY	B+	4.0	13.20
LAW 817	CIVIL PROCEDURE II	B	3.0	9.00
LAW 820	CONSTITUTIONAL LAW I	B	3.0	9.00
LAW 804	LEGAL RESRCH & WRITING SKILLS	A-	4.0	14.80
LAW 802	CONTRACTS/SALES II	B	3.0	9.00

	AHRS	EHRS	QHRS	QPTS	GPA
Semester	17.0	17.0	17.0	55.00	3.235
Cumulative	30.0	30.0	30.0	87.10	2.903

2022 Summer Session

CRS NUM	COURSE TITLE	GRADE	HOURS	QPTS
LAW 825	THE NEGOTIATING PROCESS	B	2.0	6.00
LAW 824	ALTERNATE DISPUTE RESOLUTION	B-	3.0	8.10

	AHRS	EHRS	QHRS	QPTS	GPA
Semester	5.0	5.0	5.0	14.10	2.820
Cumulative	35.0	35.0	35.0	101.20	2.891

2022 Fall Semester

CRS NUM	COURSE TITLE	GRADE	HOURS	QPTS
LAW 811	CRIMINAL PROCEDURE I	B-	3.0	8.10
LAW 890	EVIDENCE	B	4.0	12.00
LAW 920	ADMINISTRATIVE LAW	C-	3.0	5.10
LAW 882	SECURED TRANSACTIONS	C-	3.0	5.10
LAW 921	ELECTION LAW	B	3.0	9.00

	AHRS	EHRS	QHRS	QPTS	GPA
Semester	16.0	16.0	16.0	39.30	2.456
Cumulative	51.0	51.0	51.0	140.50	2.755

2023 Spring Semester

CRS NUM	COURSE TITLE	GRADE	HOURS	QPTS
LAW 851	BUSINESS ASSOCIATIONS	---	4.0	0.00
LAW 860	TAXATION I	---	4.0	0.00
LAW 915	FAMILY LAW	---	2.0	0.00
LAW 938	LAW & BUS OF INTELL PROP MGMT	---	3.0	0.00

	AHRS	EHRS	QHRS	QPTS	GPA
Semester	13.0	0.0	0.0	0.00	0.000
Cumulative	64.0	51.0	51.0	140.50	2.755

*** **End of Law Professional Academic Record** ***

UNOFFICIAL

TRANSCRIPT of ACADEMIC RECORD

TRANSYLVANIA UNIVERSITY

Ms. Tiffanie E. Tagaloa
XXX-XX-1894

Tiffanie Evalani Tagaloa
2845 Palumbo Drive Apt. 12G
Lexington, KY 40509

April 3 2023

ISSUED TO STUDENT

COURSE	Course Title	CRD	GRD	GRDPT
	AP ENGLISH LIT/COMP	1.00		0.00
ther Test		1.00		
	Term GPA 0.000 Credit	1.00		
	Cum GPA 0.000 Credit	1.00		
	AUGUST 2012 (08/13/2012 to 08/31/2012)			
EN1014	FIRST ENGAGEMENTS	1.00	CR	.....
	Term GPA 0.000 Credit	1.00		
	Cum GPA 0.000 Credit	2.00		
	FALL 2012 (09/04/2012 to 12/14/2012)			
BIO1044	BIOLOGICAL INTERACTIONS	1.00	C	2.00
FYS1004	FIRST-YEAR SEMINAR	1.00	C	2.00
ECON2024	PRINCIPLES OF MICROECONOMICS	1.00	C	2.00
ENG1074	PERSPECTIVES ON LITERATURE	1.00	A-	3.67
	Term GPA 2.418 Credit	4.00		
	Cum GPA 2.418 Credit	6.00		
	WINTER 2013 (01/07/2013 to 04/19/2013)			
CHEM1055	PRINCIPLES OF CHEMISTRY I	1.00	C-	1.67
EDU1004	OBSERVING THE LEARNER	1.00	B+	3.33
PSY1004	GENERAL PSYCHOLOGY	1.00	B	3.00
FYS1104	FIRST-YEAR RESEARCH SEMINAR	1.00	D	1.00
	Term GPA 2.250 Credit	4.00		
	Cum GPA 2.334 Credit	10.00		
	MAY 2013 (04/24/2013 to 05/21/2013)			
MATH1144	ELEMENTARY STATISTICS	1.00	A	4.00
	Term GPA 4.000 Credit	1.00		
	Cum GPA 2.519 Credit	11.00		
	FALL 2013 (09/03/2013 to 12/13/2013)			
EDU2014	SCHOOLING IN AMERICAN CULTURE	1.00	A	4.00
ANTH1024	CULTURAL ANTHROPOLOGY	1.00	A-	3.67
EDU2164	CONSTRUCTIVIST PEDAGOGY	1.00	B+	3.33
HIST1024	WESTERN CIVILIZATION II	1.00	B-	2.67
	Term GPA 3.418 Credit	4.00		
	Cum GPA 2.795 Credit	15.00		
	WINTER 2014 (01/06/2014 to 04/18/2014)			
EDU2094	STANDARDS BASED INSTRUCTION	1.00	A	4.00
EDU2104	TEACHING OF MATHEMATICS I	1.00	A	4.00
ENG2294	ST: HIST. OF ENG. LANGUAGE	1.00	A	4.00
MATH1304	CALCULUS I	1.00	A	4.00
	Term GPA 4.000 Credit	4.00		
	Cum GPA 3.079 Credit	19.00		
	MAY 2014 (04/23/2014 to 05/20/2014)			
MATH2504	THE MATHEMATICIAN'S TOOLKIT	1.00	B	3.00
	Term GPA 3.000 Credit	1.00		
	Cum GPA 3.074 Credit	20.00		

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COURSE	Course Title	CRD	GRD	GRDPT
	SUMMER 2014 (06/09/2014 to 07/11/2014)			
Transfer Credit:				
Bluegrass Community	0645	1.00		
	Term GPA 0.000 Credit	1.00		
	Cum GPA 3.074 Credit	21.00		
	FALL 2014 (09/02/2014 to 12/12/2014)			
EDU3124	YOUNG ADOLESCENTS	1.00	B	3.00
ENG2144	WOMEN'S LITERATURE	1.00	C+	2.33
PSY3124	ABNORMAL PSYCHOLOGY	0.00	W	.....
SPAN1024	SPANISH II: THE SPANISH WORLD	1.00	B+	3.33
	Term GPA 2.887 Credit	3.00		
	Cum GPA 3.048 Credit	24.00		
	WINTER 2015 (01/05/2015 to 04/17/2015)			
EDU3054	LITERACY IN CONTENT AREAS	1.00	C	2.00
SPAN1034	SPANISH III: TOPICAL ISSUES	1.00	C-	1.67
WRC2114	INTERPERSONAL COMMUNICATION	1.00	B-	2.67
	Term GPA 2.113 Credit	3.00		
	Cum GPA 2.931 Credit	27.00		
	MAY 2015 (04/22/2015 to 05/19/2015)			
EDU3244	PRACTICUM	1.00	CR	.....
	Term GPA 0.000 Credit	1.00		
	Cum GPA 2.931 Credit	28.00		
	SUMMER 2015 (06/08/2015 to 07/10/2015)			
Transfer Credit:				
Bluegrass Community	0645	1.00		
	Term GPA 0.000 Credit	1.00		
	Cum GPA 2.931 Credit	29.00		
	FALL 2015 (09/08/2015 to 12/18/2015)			
EDU3104	THE TEACHING OF MATHEMATICS II	1.00	A-	3.67
EDU3134	MIDDLE LEVEL LEARNING	1.00	B-	2.67
EXSC1113	LIFETIME FITNESS AND WELLNESS	0.75	CR	.....
WRC2354	CLASSICAL RHETORIC I	1.00	B	3.00
ENG1144	INTRODUCTION TO FICTION	1.00	A-	3.67
	Term GPA 3.253 Credit	4.75		
	Cum GPA 2.977 Credit	33.75		
	WINTER 2016 (01/11/2016 to 04/22/2016)			
EDU4414	STUDENT TEACHING MIDDLE LEVEL	4.00	CR	.....
	Term GPA 0.000 Credit	4.00		
	Cum GPA 2.977 Credit	37.75		
	MAY 2016 (04/27/2016 to 05/24/2016)			
EDU4514	SENIOR SEMINAR	1.00	B	3.00
	Term GPA 3.000 Credit	1.00		
	Cum GPA 2.978 Credit	38.75		

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April 3 2023

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Degree Received: Bachelor of Arts
Date Conferred.: 05/28/2016
Majors.....: Middle Grades Education

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EXPLANATORY LEGEND AND AUTHENTICITY CONFIRMATION INFORMATION ON REVERSE

Where Should Prisoners Be Counted?

The "one person, one vote" principle is understood to be embedded in the Equal Protection Clause of the 14th Amendment.[1] This principle requires that all votes have equal weight, so that no matter where a person is located at physically their vote matters the same way anyone else's vote would.[2] The Supreme Court has consistently protected the "one person, one vote principle,"[3] emphasizing the importance of protecting the equality of all votes and voters, while simultaneously discouraging vote dilution and voter disenfranchisement.[4] There is, however, currently a gray zone that exists as it relates to the "one person, one vote" principle. Presently, there is a "usual residence rule" that has been interpreted to stipulate that prisoners are residents of where they usually eat and sleep.[5] When this rule was originally proposed, centuries ago, there was no real impact on voters and the process of voting.[6] But now, with some prison populations rivaling small countries, how to accurately account for prisoners during the redistricting phase of voting is a more complex process that was not accounted for by state legislatures.[7]

This essay proceeds as follows: first, the evolution of the "one person, one vote" doctrine and its impact on prisoners is further discussed; second, the issue of counting prisoners as residents of where they are currently incarcerated and its negative impact are expanded on; third, a potential solution

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[1] Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275, 276 (2012); *Landmark Legislation: The Fourteenth Amendment*, Senate Historical Office, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm, (last visited Dec. 9, 2022).
[2] Krabill & Fielding, *supra* note 1, at 276.
[3] Krabill & Fielding, *supra* note 1, at 278-79. *See* Moore v. Ogilvie, 394 U.S. 814 (1969); Bush v. Gore, 531 U.S. 98 (2000).
[4] Krabill & Fielding, *supra* note 1, at 293-94.
[5] Emmanuel Felton, *As redistricting begins, states tackle the issue of 'prison gerrymandering'*, The Washington Post (Sep. 28, 2021), https://www.washingtonpost.com/national/as-redistricting-begins-states-tackle-the-issue-of-prison-gerrymandering/2021/09/28/917f9670-167a-11ec-ae9a-9c36751cf799_story.html; Dale E. Ho, Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle, 22 Stan. L. & POL'y REV. 355 (2011).
[6] Emmanuel Felton, *As redistricting begins, states tackle the issue of 'prison gerrymandering'*, The Washington Post (Sep. 28, 2021), https://www.washingtonpost.com/national/as-redistricting-begins-states-tackle-the-issue-of-prison-gerrymandering/2021/09/28/917f9670-167a-11ec-ae9a-9c36751cf799_story.html; Peter Wagner, Breaking the Census: Redistricting in an Era of Mass Incarceration, 38 WM. MITCHELL L. REV. 1241, 1242-43 (2012).
[7] Felton, *supra* note 6; Wagner, *supra* note 6 at 1247-48.

to prison gerrymandering is proposed; and finally the potential drawbacks to the suggested solution will be evaluated.

The Evolution of "One Person, One Vote" and Prisoners

The "one person, one vote" principle has needed regular judicial intervention since its earliest inception. In 1961, voters in Jefferson County, Alabama filed a lawsuit against the State of Alabama.[8] The plaintiffs alleged that the most recent apportionment of the Alabama legislature was based on outdated census information irrelevant to the current voting population of Alabama.[9] The Alabama Constitution, however, required that the legislature be reapportioned every ten years.[10] The plaintiffs central argument was that when the Alabama legislature failed to reapportion itself, the Alabama legislature violated the Equal Protection Clause of the 14th Amendment.[11] The United States Supreme Court determined that the federal Constitution protects the fundamental right of qualified persons to vote in state and federal elections and that Alabama's failure to reapportion itself every ten years was unconstitutional.[12] The Court further held that the Equal Protection Clause of the federal Constitution requires the seats in a state legislature be apportioned on the basis of population to equally weight one vote for each person that is a resident of a state legislative district.[13] And thus, the "one person, one vote" principle was zealously protected by the judiciary.

There is an ongoing debate surrounding how to accurately count incarcerated populations for purposes of redistricting. Voting rights advocates have argued against counting incarcerated individuals as residents of where they are currently incarcerated in population counts during the redistricting process, and so have the courts. In Calvin v. Jefferson County Board of Commissioners, a Florida District Court

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[8] Reynolds v. Sims, 377 U.S. 533, 537-38 (1964); Alex McBride, *Landmark Cases: Reynolds v. Sims (1964)*, Thirteen (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/rights/landmark_reynolds.html.
[9] Reynolds v. Sims, 377 U.S. at 541-44.
[10] *Reynolds*, 377 U.S. 533 (1964).
[11] 377 U.S. at 541.
[12] *Id*. at 584-86.
[13] *Id.*

held that including the prison population as part of the voting population scheme diluted both the representational and voting strength of voters belonging to other districts; essentially violating those voters' Equal Protection rights and the doctrine of "one person, one vote."[14] It was imperative to remove the inmate population out of the district they were a part of to protect the voting power of the constituents in neighboring districts. The court further elucidated that the Jefferson Correctional Institution inmates were "isolated from the surrounding community" and lacked a "meaningful representational nexus" with the district they belonged to.[15]

Another example took place during 2011 in New York.[16] In Little v. LATFOR, the constitutionality of a law that sought to end prison gerrymandering was challenged.[17] The New York law in question determined that when it comes to redistricting, prisoners should be counted as residents of their home states and not where they are currently located as a result of incarceration.[18] The law was ultimately upheld by the New York Supreme Court as constitutional.[19] The New York Supreme Court held that New York was allowed to count incarcerated people as residents of their home states for

[14] Calvin v. Jefferson County Board of Commissioners, 172 F.Supp.3d 1292, 1325-36 (N.D.Fla 2016).
[15] *Id.* at 1321-22.
[16] *Little v. LATFOR (Defending a state law that ended prison-based gerrymandering)*, NYCLU (Aug. 23, 2011), https://www.nyclu.org/en/cases/little-v-latfor-defending-state-law-ended-prison-based-gerrymandering; Wagner, *supra* note 6; *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/.
[17] *Little v. LATFOR (Defending a state law that ended prison-based gerrymandering)*, NYCLU (Aug. 23, 2011), https://www.nyclu.org/en/cases/little-v-latfor-defending-state-law-ended-prison-based-gerrymandering; Wagner, *supra* note 6; *New York to correct miscount of incarcerated people*, Prison Policy Initiative (Aug. 3, 2010), https://www.prisonersofthecensus.org/news/2010/08/03/ny_law/.
[18] *Little v. LATFOR (Defending a state law that ended prison-based gerrymandering)*, NYCLU (Aug. 23, 2011), https://www.nyclu.org/en/cases/little-v-latfor-defending-state-law-ended-prison-based-gerrymandering; *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/.
[19] Wagner, *supra* note 6; *New York to correct miscount of incarcerated people*, Prison Policy Initiative (Aug. 3, 2010), https://www.prisonersofthecensus.org/news/2010/08/03/ny_law/; *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/.

redistricting purposes.[20] This was another step towards upholding and protecting the "one person, one vote" doctrine by being careful of where to count prison populations during the redistricting process.

Lastly, in Fletcher v. Lamone, the Supreme Court affirmed the lower court and held that Maryland's "No Representation Without Population Act," was constitutional.[21] Maryland's "No Representation Without Population Act" was enacted in 2010 and ended the unfair practice of including incarcerated individuals in population counts for redistricting purposes.[22] The Maryland District Court concluded that the state of Maryland "may adjust census data during the redistricting process."[23] The court even noted that the Census Bureau's own practice of counting incarcerated individuals as residents of where they are currently incarcerated was a pragmatic, cost-efficient decision exclusively.[24] Combining the other illustrations with this example, varied voting bodies across the country have agreed that continuing to count prisoners as a part of the population where they are incarcerated distorts democracy.

The arguments for abolishing prison gerrymandering are overwhelmingly clear. The courts' plethora of rulings have been viewed as a clear end to prison gerrymandering essentially affirming the "one person one vote"doctrine, originally established in Reynolds v. Sims. It should no longer be the accepted practice to count prisoners as residents of where they are currently incarcerated. It is overwhelmingly clear that it is time to put an end to the "usual residence" rule.

Why the Current Approach is Not Enough

[20] *Little v. LATFOR (Defending a state law that ended prison-based gerrymandering)*, NYCLU (Aug. 23, 2011), https://www.nyclu.org/en/cases/little-v-latfor-defending-state-law-ended-prison-based-gerrymandering; *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/.
[21] Fletcher v. Lamone, 567 U.S. 930 (2012).
[22] *Id.*
[23] *Id.*
[24] *Id.*

Currently, the most common approach allows the Census Bureau to count prisoners as residents of the town where they are incarcerated, this is known as the "usual residence" rule.[25] The population data accumulated by the Census Bureau is then used in the redistricting process to draw proportional voting districts.[26] The problem with this approach is that it distorts the population counts of various rural communities where prisons are housed.[27] It creates the illusion of needing more representation in areas where prisons exist.[28] This method unfairly distorts the voting power of residents in towns with prisons.[29] This distortion places more weight on the voting power of those who reside in areas where prisons exist and dilutes the voting power of the voters who do not live near prisons.[30]

Another issue with including prisoners as residents of the towns where they are incarcerated is that prisoners generally lose their right to vote once they become incarcerated.[31] Counting prisoners as "voters" is misleading when in actuality their right to vote extinguished with their prison sentence.[32] Today, there are only two states that do not completely bar prisoners from voting during or upon the completion of their prison sentence.[33] Most states don't provide prisoners with an opportunity to vote while they are incarcerated, but some do.[34] Thus, counting prisoners as voters when in reality they usually are not unfairly inflates the voting power of those that live near or around prisons.

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[25] Felton, *supra* note 6; Ho, *supra* note 5.
[26] Felton, *supra* note 6; Ho, *supra* note 5.
[27] Garrett Fisher, Taylor King, & Gabriella Límon, *Prison Gerrymandering Undermines Our Democracy*, Brennan Center For Justice (Oct. 22, 2021), https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy; Hansi Lo Wang, *Most Prisoners Can't Vote, But They're Still Counted in Voting Districts*, NPR (Sep. 26, 2021), https://www.npr.org/2021/09/22/1039643346/redistricting-prison-gerrymandering-definition-census-congressional-legislative; *Felon Voting Rights*, National Conference of State Legislatures (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.
[28] Fisher, King, & Límon, *supra* note 27; Wang, *supra* note 27.
[29] Fisher, King, & Límon, *supra* note 27.
[30] Wang, *supra* note 27.
[31] Fisher, King, & Límon, *supra* note 27; *Felon Voting Rights*, National Conference of State Legislatures (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.
[32] Fisher, King, & Límon, *supra* note 27; Wang, *supra* note 27.
[33] *Felon Voting Rights*, National Conference of State Legislatures (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.
[34] Wang, *supra* note 27; *Felon Voting Rights*, National Conference of State Legislatures (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

Lastly, most states agree that incarceration does not change one's residency status.[35] In fact, most prisoners do not stay in the state where they are imprisoned once their sentences are complete; they usually go back to their home state.[36] The states have also already considered whether a person's residency is altered by incarceration because many state constitutions have expressly determined that incarceration has no impact on where a person may be considered a resident.[37] In Stifel v. Hopkins, the Sixth Circuit eloquently stated "[i]t makes eminent good sense to say as a matter of law that one who is in place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile."[38] It seems counterintuitive to then imply that prisoners become residents of the state where they are incarcerated. Most states have already independently determined that incarceration status does not impact someone's residency status.[39]

Where Should Prisoners Be Counted?

There are various solutions to prison gerrymandering. Which solution is best depends on whether the right to vote currently exists in a specific state for prisoners and then for later-felons. It is first important to decide whether or not prisoners should be included in the population counts used during the redistricting process. One way to address the negative impacts of prison gerrymandering is to completely exclude prisoners from the voting population entirely. This method should be appealing to states that

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[35] *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/; Aleks Kajstura & Mike Wessler, *Advocates to Census Bureau: End prison gerrymandering in 2030*, Prison Policy Initiative (Nov. 21, 2022), https://www.prisonersofthecensus.org/news/2022/11/21/2022_frn/.

[36] *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/; Kajstura & Wessler, *supra* note 36.

[37] Kajstura & Wessler, *supra* note 36; *New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address*, Prison Legal News (Oct. 15, 2012), https://www.prisonlegalnews.org/news/2012/oct/15/new-york-court-upholds-law-requiring-census-count-to-use-prisoners-pre-incarceration-address/.

[38] Stifel v. Hopkins, 477 F.2d 1116, 1121 (1973).

[39] Andrea Fenster, How many states have ended prison-based gerrymandering? About a dozen*!, Prison Policy Initiative (Oct. 26, 2021), https://www.prisonersofthecensus.org/news/2021/10/26/state_count/; Kajstura & Wessler, *supra* note 36.

do not re-enfranchise felons to vote after their prison sentences are complete. If a person loses their right to vote once they become a felon and are no longer allowed to regain their right to vote, it seems obvious to not include those people as a part of the voting population.

If it is determined that prisoners should be included in the population counts used to redistrict voting populations, then the bright line rule should be to count prisoners as residents of their home states and not where they may be incarcerated. Eleven states have already passed legislation that does not allow for prison gerrymandering in state legislative districts.[40] This shows clear support for the rule proposed. The courts have also shown clear support for counting prisoners as residents of their home states. Having a bright line rule would make it easier to apply across all states so that each individual state would not need to create legislation to effectively end prison gerrymandering. This bright line rule would also be another way of protecting the voting power of everyone, so that prisons do not unfairly inflate the voting population size of towns that house prisoners.

There may be issues that arise when trying to apply the bright-line rule suggested above. Logistically, it could be a nightmare when it is unclear to determine where a prisoner is originally from or where they may be domiciled. For example, homeless communities might be unfairly scrutinized during this process and it is unlikely they will have records to definitively prove their residency status anywhere. But, I do not believe that should deter a bright line rule because including prison populations in redistricting counts has consistently, negatively impacted democracy.

What Is Next?

America is one of the greatest countries to exist and part of this may be because of its continuous fight to protect the voice of the people. Voting is one of the greatest privileges afforded to the average American. The courts have fervently protected the voting power of every citizen to ensure that every vote

[40] Fenster, *supra* note 40.

is weighted fairly. Continuing to count prisoners as residents of where they are incarcerated at currently is an injustice to democracy as an institution. The "usual residence" rule should no longer be applicable in the United States. Further, if prisoners are to remain embedded in the redistricting process they should count as residents of their home states.

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Date of JD/LLB	**May 15, 2024**
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June 12, 2023

The Honorable Jamar K. Walker
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Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Columbia Law School and am writing to apply for a 2024-2025 clerkship with your chambers. I spent my last two years of high school living in Yorktown, Virginia and would be eager to return to the area.

I have spent my time at Columbia taking every opportunity to hone my research, writing, and editing skills, which I believe would be an asset to your chambers. I am a Note Editor on the *Columbia Journal of Law & Social Problems*, where I will spend next year guiding a cohort of 2L staffers through their note-writing process while working with the Editorial Board to finalize for publication my own Note on the unworkability of traditional domicile analysis for military personnel. My work as a Fellow at the 1L Writing Center, as an editor for the NALSA Moot Court, and as a Faculty Research Assistant have provided me with valuable experience in crafting legal arguments and have helped polish my eye for detail and collaboration skills.

Enclosed please find my resume, writing sample, and transcript. Also enclosed are letters of recommendation from Professors Philip Genty and Elizabeth Emens, as well as a letter from Deborah Francois of Shanies Law Office.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,
Haley Talati

HALEY TALATI

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Columbia Journal of Law & Social Problems, Note Editor
Teaching Assistant: Constitutional Law, Contracts, and Legal Practice Workshop
Faculty Research Assistant
Publications: "Roadblocks to Finding Home: Traditional Domicile Analysis' Fundamental Unworkability for Military Families" (*Columbia Journal of Law & Social Problems*, forthcoming)

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Summer Associate Summer 2022
Performed legal research, wrote memoranda, and helped draft filings on procedural and substantive issues relevant to wrongful conviction cases. Assisted with client and witness interviews and discrete research and analytical tasks.

COLORADO FAIR SHARE ACTION, Denver, CO
Campaign Associate August – November 2020
Remotely recruited a team of volunteers who conducted hundreds of weekly phonebanking calls into their neighborhoods to drive voter turnout for local progressive candidates. Trained volunteers in phonebanking skills and data tracking. Made hundreds of non-recruitment phonebanking calls each week to discuss policy issues and ballot acquisition with local voters.

MARCH FOR OUR LIVES, Washington, DC
Policy Associate August 2019 – July 2020
Created informational resources for lobbyists and chapter members, including guides to both individual bills and the organization's comprehensive policy platform. Led advocacy groups through meetings with congressional staffers as a part of organizational lobby days to support bills promoting issues such as gun violence research funding. Participated in decision-making meetings with the rest of the national policy team to determine which bills the organization would prioritize in its lobbying efforts.

INTERESTS: Hiking in Ohio, watching the Dallas Cowboys, playing ukulele, feminist book club

Columbia Law School

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Program: Juris Doctor

Haley E Talati

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Emens, Elizabeth F.	1.0	A
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR
L6822-2	Teaching Fellows	Emens, Elizabeth F.	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9549-1	S. Religious Freedom & Reproductive Rights	Schwartzman, Micah	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6474-1	Law of the Political Process	Briffault, Richard	3.0	B+
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A-
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6330-1	S. Native American Law	Benally, Precious Danielle	2.0	A
L6683-1	Supervised Research Paper	Genty, Philip M.	3.0	CR
L6674-2	Workshop in Briefcraft [Minor Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6121-34	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	HP
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn	0.0	CR
L6116-4	Property	Merrill, Thomas W.	4.0	B+
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A
L6118-2	Torts	Rapaczynski, Andrzej	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: International Problem Solving	Hakimi, Monica	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	A
L6133-7	Constitutional Law	Murray, Kerrel	4.0	A
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-18	Legal Practice Workshop I	Tyrrell, Kirby B; Whaley, Hunter	2.0	HP

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 61.0

Total Earned JD Program Points: 61.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	James Kent Scholar	1L

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter to highly recommend Haley Talati for a judicial clerkship position in your chambers. I am Counsel at the public interest law firm of David B. Shanies Law Office LLC. I had the pleasure of working closely with Haley as her direct supervisor when she participated last year in my firm's summer associate program. Over the course of the two months that Haley worked with us, I was consistently impressed with her intellectual curiosity, remarkable work ethic, and professionalism. I am confident that she possesses the qualities necessary to excel as a judicial law clerk.

As a summer associate, Haley demonstrated strong legal research and writing skills and analytical abilities. One of her main assignments was to prepare a research memorandum addressing whether municipal defendants can avoid liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), by arguing that the right allegedly violated was not clearly established at the time of the events. Her 21-page memorandum was thorough, cogent, and superbly written. Throughout the course of the summer, I regularly relied on Haley to conduct research on discrete legal questions that arose in our cases, including on issues concerning venue and hearsay. Her ability to quickly grasp legal concepts allowed her to produce high-quality work within tight deadlines. Indeed, by the end of the summer, Haley completed the most assignments out of all the interns.

Haley approached every assignment, no matter how large or small, with an impressive level of dedication. Whether she was drafting portions of a complaint or compiling a chart surveying types of state law claims brought in wrongful conviction cases, Haley delivered outstanding work product. She was often the first summer associate to arrive in the morning and the last to leave in the evening, and her attention to detail was unparalleled. I had full confidence that I could trust the quality of her work, and Haley made it easy to be her supervisor.

What also sets Haley apart is her insatiable intellectual curiosity. She has an inherent drive to delve deeply into legal principles and explore every nuance. Perhaps because her father was in the military and she was raised in different environments across the country, Haley is keen on seeking out new challenges and considering multiple perspectives. This was evident in the way she approached her work. For example, while working on the Monell research assignment, Haley explored additional research avenues that we had not previously considered and proposed creative ways to challenge municipal defendants' efforts to evade liability.

Finally, at a personal level, Haley is compassionate, poised, and mature beyond her years. During the summer, one of our clients was exonerated after spending nearly 27 years in prison for a crime he did not commit. Knowing that our client is an avid reader like herself, Haley spent her lunch break at the bookstore, buying books by our client's favorite authors so that she and other summer associates could assemble a care package to welcome him back home. In short, Haley was a delight to work with, and I would not hesitate to work with her again if the opportunity arose.

I recommend Haley without reservation and believe that she has the potential to be an outstanding judicial law clerk. If you require any further information or would like to discuss Haley's qualifications in more detail, please do not hesitate to contact me. Thank you for considering her application.

Respectfully,

Deborah I. Francois
Counsel
David B. Shanies Law Office LLC

Deborah Francois - deborah@shanieslaw.com - (917) 202-5794

Columbia
Law School

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor in
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June 9, 2023

Re: Haley Talati

Dear Judge:

I am writing to recommend Haley Talati, a third year student at Columbia, for a judicial clerkship. I have been privileged to work with Ms. Talati in both her first and second years.

My first opportunity to work with Ms. Talati was in my Civil Procedure course in the Fall 2021 semester. Despite the size and challenging circumstances – 145 students, all masked – she stood out in the classroom for her level of engagement and facility with the material. In our initial office meeting early in the semester, she impressed me as well with her serious sense of purpose and clear goals for her legal education and career.

Ms. Talati also did excellent work on the writing assignments I assigned during the semester, and one of hers – analyzing a personal and subject matter jurisdiction problem – was singled out by her teaching fellow for special recognition. After completing my blind grading, I was therefore pleased, but not surprised, to learn that her examination was one of the very best I had received. She earned an A for the course, one of the few I was permitted under our strict mandatory first year curve.

Ms. Talati approached me after the end of the semester to ask about being a teaching fellow in her second year, but because teaching assignments had not yet been finalized, I was unable to give her an answer. By the time I knew I would be teaching the course again and offered her a position, she had already accepted an opportunity to work with one of my colleagues. She had clearly acquired a widespread reputation for academic excellence and was very much in demand. It is one of my regrets that I lost the chance to have her in this role.

Beyond my course, Ms. Talati's academic accomplishments have been reflected in a number of ways. In both semesters of our first year writing skills course, Legal Practice Workshop, she earned a grade of High Pass, which is given to the top students in the course. She was also selected for membership on the *Columbia Journal of Law & Social Problems* and has been named a Notes Editor for her third year. In addition, for her overall academic performance in her first year, she was named a James Kent Scholar, which is the highest honor we give students annually. It is reserved for only a few students in each class. Although honors for 2022-2023 have not yet been announced, I expect that she will again earn honors for her second year.

Ms. Talati has also been a generous member of the student community. For her second year, she was selected to be a Moot Court Student Editor and a Writing Center Fellow, and in both roles she mentored other students in their writing and research.

Despite missing out on having Ms. Talati as a teaching fellow, I have had an additional opportunity to work with her. In her second year, she asked me to supervise her Note, and I eagerly agreed. As expected, it was a gratifying experience. She came to me with a fully formed plan for the Note, and in each of our meetings and email communications her research and thinking had progressed in important ways. It was a most fruitful collaboration.

Ms. Talati's Note focuses on the way the concept of "domicile" has been applied to military families, and the detrimental effects of this. As she explains in the Introduction:

> [F]or military personnel and their families, determining domicile is a complicated endeavor, and general common law principles as well as statutory reforms create more barriers to establishing and maintaining a domicile of choice than the civilian population typically faces. These barriers expose military families, especially those who relocate frequently, to increased litigation risks . . . .

Ms. Talati's interest in these issues arose from the experiences of her own military family, as well as other families they knew. In addition to her analytic strengths, she brought passion and enthusiasm to the project. Our conversations operated on two levels – we talked both about technical principles of personal and subject matter jurisdiction and also about the practical experiences of the families. Her Note has this same duality of "head" and "heart," combining a rigorous legal analysis with a clear, compelling explanation of how people's lives are affected.

Throughout the writing process, Ms. Talati engaged thoughtfully with my comments and questions and was completely open to my suggestions, though I had relatively few. As in my experiences with her in Civil Procedure, she displayed a sincere desire to learn and improve. The Note, which has been accepted for publication[1], shows complete command of the subject matter.

It is clearly and persuasively written and comprehensively researched, with meticulous attention to detail.

As with everything she does, Ms. Talati has given careful thought to her reasons for pursuing a judicial clerkship. She wants to continue to improve her legal research and writing skills and be exposed to the many different issues that arise across cases. She sees clerking as a way to be of service and to continue learning after law school.

[1] *Roadblocks to Finding Home: Traditional Domicile Analysis' Fundamental Unworkability for Military Families*, 57 COLUM. J. OF L. & SOC. PROBS. --- (forthcoming).

In short, Ms. Talati is superbly talented, with outstanding intellectual abilities, writing and analytic proficiency, and collaborative skills. I believe that she is an ideal clerkship candidate, and I recommend her to you with enthusiasm.

Please contact me if you need additional information.

Sincerely yours,

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility
212-854-3250
pgenty@law.columbia.edu

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ms. Haley Talati for a clerkship in your chambers. Ms. Talati is a very smart, skilled, and committed law student, who I expect will be an excellent clerk.

I know Ms. Talati in three ways: as a student in my Contracts class in Fall 2021; as my Research Assistant in Spring 2023; and as a Teaching Assistant for my Spring 2023 Contracts course. I therefore have a strong basis on which to comment on Ms. Talati's performance and prospects.

My introduction to Ms. Talati came through first-year Contracts in the Fall of 2021. The grades in that course were based primarily on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions.

Ms. Talati earned an "A" in the course. She performed well on all segments of the exam, and her policy essay was especially strong.

Based on her excellent performance in Contracts, I invited Ms. Talati to become my Research Assistant (RA) beginning in the Spring of 2023. My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Talati conducted interdisciplinary research on widely varying topics related to discrimination. She wrote strong memos on these topics and presented her work effectively in the Briefing Meetings. She earned an "A" in this position.

Ms. Talati was such an excellent Contracts student that I also invited her to serve as a Teaching Assistant for my Contracts class in the Spring of 2023. The responsibilities in this role include holding TA sessions once a week to review material with students, supporting the first-year students through the transition to the first semester of law school, supporting my teaching work in and out of the classroom, and reviewing and providing feedback on the midterm exams. This is not a graded position, but my impression is that Ms. Talati did a terrific job with her TA work.

Ms. Talati has had a most impressive law school career so far, both inside and outside the classroom. During her 1L year, Ms. Talati was named a James Kent Scholar, Columbia Law School's designation of highest academic honors. She also won Columbia's NALSA Moot Court competition and best-brief award. She went on to spend her 2L year as an editor for the team, a role that involved providing feedback on team briefs as well as coaching team practices approximately twice per week. Ms. Talati also served in other 1L support roles as a 2L, including as a Teaching Assistant for two doctrinal classes, including mine, and as a Fellow at the 1L Writing Center, a position that requires earning a high pass grade in both semesters of 1L LPW. Finally, Ms. Talati is a member of the *Journal of Law and Social Problems* and will spend her 3L year guiding a group of 2L staffers through the Note-writing process. Her own Note, which explores the difficulties that military personnel and families encounter within the traditional domicile framework and the failings of existing statutory reforms, will be published in the upcoming volume of the *Journal*.

During her summers, Ms. Talati is gaining experience that builds on her already strong skill set. She spent her 1L summer as an Associate at the small civil rights firm of Shanies Law Office, which takes on a wide spread of cases but was primarily handling wrongful conviction cases during the 2022 summer. Currently, Ms. Talati is a Summer Associate at Weil, Gotshal & Manges, where she will rotate through the Litigation and Restructuring Departments.

On a personal note, I might add that Ms. Talati's ability to excel immediately in law school may derive in part from the adaptability she gained from growing up in an Air Force family. Her family moved approximately every two years—sometimes more often—until she was in college. In addition to gaining exposure and connections to many different parts of this country, Ms. Talati became accustomed to arriving in a new environment, learning what she needed to know, and gearing up to full capacity swiftly. This should prepare her well for clerking, since most clerkships involve large amounts of work over a short arc of the year, so getting up to speed quickly is an asset.

In sum, Ms. Talati is a very talented law student with an impressive track record for high-quality work. I believe she will be an excellent clerk, and I strongly recommend her to you.

Let me know if I can provide any other information. I would be happy to speak further. I am out of the office this Summer, but recommendations are a priority, and I can generally be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Elizabeth F. Emens

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Haley Talati
425 W 121st St., Apt. 908, New York, NY 10027
(254) 723-8242

The following writing sample is the argument section of a paper I wrote in the Fall 2022 semester for my Native American Law seminar. The paper analyzes the then-recent Ninth Circuit decision in Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022), which found that the federal government's conveyance of an Apache sacred site to a mining company that would physically destroy it did not substantially burden Apache religious practices under the Religious Freedom Restoration Act. The introductory and conclusion sections, as well as sections providing additional historical and legal background to the case, have been omitted. This argument section reflects the final draft of the paper, a previous draft of which had received extremely minimal edits from the course's professor.*

The Ninth Circuit wrongly decided *Apache Stronghold* both normatively and by any reasonable interpretation of RFRA and the relevant precedents. The majority invoked cases that are not remotely analogous to the facts of *Apache Stronghold* in a way that reflects its own misguided projection of Christian principles onto indigenous religions. Meanwhile, the Supreme Court has spent years building up impenetrable safeguards against the slightest inconveniences to Christian beliefs, while decisions like *Apache Stronghold* have relegated minority religions such as that of the Apache tribes to a place of insignificance. To prevent the exacerbation of these discriminatory trends, one of these courts must reverse *Apache Stronghold*.

Apache Stronghold and Other Tribal Free Exercise Cases

The *Apache Stronghold* majority asserted that *Lyng* and *Navajo Nation* are "factually and legally analogous" to each other and to this case.[1] The decision also noted that *Navajo Nation* relied in part on *Lyng*, a pre-RFRA case characterizing *Sherbert* and *Yoder* as representing the only way that plaintiffs in free exercise challenges can establish a substantial burden: showing

[1] *Apache Stronghold*, 38 F.4th at 756.

"coerc[ion] by the Government's action into violating their religious beliefs."[2] *Navajo Nation* imported the *Lyng* standard onto RFRA even though *Lyng* itself did not use the phrase "substantial burden," a discrepancy the Ninth Circuit did not find significant.[3] The majority also referenced *Lyng*'s troubling assertion that a government-imposed burden on free exercise does not trigger the compelling interest and least restrictive means requirement even when the government action would "virtually destroy the… Indians' ability to practice their religion."[4]

The majority erred in equating the facts of these two precedents with those of *Apache Stronghold*.[5] The certainty that the Resolution Copper project will utterly devastate Oak Flat is not comparable to the burdens that either *Lyng* or *Navajo Nation* considered by any reasonable standard of measurement. The road paving project at issue in *Lyng* would have created audible and visual disturbances to the environment of the religious area but would not have physically intruded on the sites of sacred rituals[6] — meanwhile, Resolution Copper intends to turn almost all of Oak Flat into a crater. The artificial snow project the Ninth Circuit evaluated in *Navajo Nation* would have put artificial snow containing 0.0001% human waste onto the sacred mountain, but left the mountain itself intact[7] — but nothing will be left of Oak Flat. While the projects considered in these two cases would certainly be harmful to tribal religious practices, they cannot be compared in good faith to the burden imposed by physically wiping out an entire religious site. Further, *Lyng*'s remarks about "virtual destruction" that *Apache Stronghold*

[2] *Id*. at 758 (quoting *Lyng*, 485 U.S. at 449).
[3] *Id*. at 755 n.8.
[4] *Id.* at 755 (quoting *Lyng*, 485 U.S. at 451).
[5] This was a relevant issue in the National Native American Law Students Association (NNALSA) Moot Court 2021-22 problem (which was based on the *Apache Stronghold* case), and my thinking about some of the arguments in this paragraph was influenced by practice rounds and discussions with the other Columbia Law School team members who worked on the RFRA question: Louis Dugre, Margaret Hassel, Rohan Naik, Kyle Oefelein, Nikolos Schillaci, Ben Smith, and Rose Wehrman.
[6] *Lyng*, 485 U.S. at 453.
[7] *Navajo Nation*, 535 F.3d at 1062-63.

emphasized so heavily were likely dicta, given that before the case reached the Supreme Court, the California Wilderness Act of 1984 had granted much of the land at issue protection from commercial activity.[8]

The at best tenuous ties between *Lyng*, *Navajo Nation*, and *Apache Stronghold* suggest that the *Apache Stronghold* majority either cannot or will not discern the nuances of how government activity burdens indigenous religious practices. These comparisons seem to implicitly rely on Christian-esque notions about the core of true religious practice being totally internal and individual. Many denominations of Christianity emphasize the idea of *sola scriptura, sola fide, sola gratia* — scripture, faith, and God's grace as "*the* basis of a Christian life."[9] The projection of these principles that underlie much of Protestant Christianity, strands of which dominate the religious demographics of the United States,[10] might explain the *Apache Stronghold* majority's failure to perceive the factual differences between burdens that completely destroy a religious site and those that do not. Oak Flat itself is the heart of the Apache religion, while no physical place occupies a comparable role for Christians. The Ga'an cannot simply move somewhere else, and the religious ceremonies are specifically linked to the physical space of Oak Flat.[11] (Yet it remains notably difficult to imagine a federal court upholding a government program that would destroy, for example, the last physically standing Baptist Church,[12] so while the Ninth Circuit's decision here may reflect a misunderstanding about the fundamental

[8] *Lyng*, 485 U.S. at 446.
[9] Else Marie Wiberg Pederson, *The Significance of the Sola Fide and the Sola Gratia in the Theology of Bernard of Clairvaux (1090-1153) and of Martin Luther (1486-1546)*, 47 CISTERCIAN STUDIES QUARTERLY 379-406, 383 (2012).
[10] Religious Landscape Study, PEW RESEARCH CENTER, https://www.pewresearch.org/religion/religious-landscape-study/ (last visited Dec. 20, 2022).
[11] Opening Brief of Plaintiff-Appellant Apache Stronghold at 2, 9, *Apache Stronghold*, 38 F.4th 742 (No. 21-15295).
[12] The Columbia Law School NNALSA Moot Court coaches proposed a similar hypothetical during 2021-22 oral argument practices.

differences between indigenous religious traditions and Christianity, it may also straightforwardly establish an inescapable double standard.)

Even if *Apache Stronghold* and *Navajo Nation* were sufficiently analogous, the Ninth Circuit misconstrued RFRA's requirements in both cases.[13] 42 U.S.C. § 2000bb(b) begins:

> The purposes of this chapter are — (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened[.][14]

The structure of the statutory text only implicates *Sherbert* and *Yoder* in "the compelling interest test" they set forth, which arises only after a court has found a substantial burden and the test's burden shifts. The statute fully separates the portions of the sentences that name the compelling interest and substantial burden components with an intervening verb clause. The text also makes no mention of *Lyng*, the case that limited the scope of the substantial burden to instances of government coercion,[15] as might be expected if RFRA adopted that framework as well. Moreover, *Sherbert* itself considered whether the government action in that case imposed "any burden" on religious free exercise,[16] which is no one's proposed standard under RFRA, so *Apache Stronghold* erred in suggesting that RFRA could have adopted the coercion-only framework from *Sherbert* and *Yoder*. The decision argued that RFRA "restored" *Sherbert* and *Yoder* themselves,[17] but the plain text of the statute only mentions the compelling interest test in relation to those cases.[18] Given this structure and context, the Ninth Circuit should have instead

[13] My thinking about some of the arguments in this paragraph, specifically the basic idea that plain meaning should control the interpretation of "substantial burden," was also influenced by NNALSA oral argument practices with the team members mentioned above.
[14] 42 U.S.C. § 2000bb(b).
[15] *See Lyng*, 485 U.S. at 450.
[16] *Sherbert*, 374 U.S. at 403.
[17] *Apache Stronghold*, 38 F.4th at 755.
[18] 42 U.S.C.A. § 2000bb(b)(1).

looked to the plain meaning of the word "substantial": "considerable in quantity; significantly great."[19] Surely the outright destruction of Oak Flat and the resulting impossibility of the tribes' continued engagement in their religious practices meet this definition.

These interpretive failures undermine the validity of this entire line of doctrine surrounding tribal free exercise challenges. The Court's callous attitude in *Lyng* reflected misunderstandings about indigenous religions just as *Apache Stronghold* did. *Lyng*, however, was a pre-RFRA case, and its reasoning should have been corrected by the statute's passage. But the problems with the majority's reasoning in *Apache Stronghold* were imported directly from *Navajo Nation*,[20] another wrongly decided case based on, this time, a misreading of the statute. The text of RFRA itself indicates that coercion is not the only way that a substantial burden can be established, so at the very least, the Ninth Circuit should have taken seriously the extent — not just the type — of the harm that the government projects in these cases threatened to impose on the affected tribes.

Instead, most notably in *Navajo Nation*, the tribes' concerns were dismissed as merely implicating individuals' "subjective spiritual experiences" about how they would perceive their sacred sites, here a mountain after it was forcibly contaminated with human waste.[21] Not only does this language yet again demonstrate the Ninth Circuit's fundamental failure to understand the differences between indigenous religions and Christianity, it also raises the question of whether the same court would truly suggest, if a government project threatened to destroy Christian places of worship, that those projects would merely be "offensive to [Christians']

[19] *Substantial*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/substantial (last visited Dec. 20, 2022).
[20] *Apache Stronghold*, 38 F.4th at 756.
[21] *Navajo Nation*, 535 F.3d at 1063.

feelings"[22] (or, even if it did, whether the court would find this to be an acceptable outcome). Intentionally or not, these cases point to a clear pattern of the courts treating free exercise claims brought by tribes unseriously, "essentially leav[ing] Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[23]

Apache Stronghold's Place Within General Free Exercise Trends

Complicating any attempt to situate a case like *Apache Stronghold* clearly within the general trends of free exercise jurisprudence is RFRA's lack of impact on the states. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded the scope of Congress's Fourteenth Amendment enforcement power because it restricted state action that would affect free exercise beyond what was already prohibited — in other words, RFRA attempted to substantively broaden the First Amendment protections[24] that still bind the states. This characterization of the large scope of the statute suggests that RFRA as it operates against the federal government should actually afford a greater level of protection for free exercise than the Free Exercise Clause itself, an idea supported by the Court's own recent admission that RFRA protects "far beyond what this Court has held is constitutionally required."[25]

Notably, recent Supreme Court cases seem to indicate that the Court is significantly expanding its conception of what the Free Exercise Clause protects, so states may be losing their slightly heightened layer of protection against free exercise challenges. The Court clarified the current standard in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021). The case suggests that in free exercise challenges brought against the states, the parallel to RFRA's substantial burden test is the rule that laws that are not "neutral and generally applicable" are

[22] *Id.*
[23] *Lyng*, 485 U.S. at 457 (Brennan, J., dissenting).
[24] *See City of Boerne*, 521 U.S. at 531.
[25] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 705 (2014).

subject to strict scrutiny.[26] This standard is triggered when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[27] Writing for the majority, Chief Justice Roberts presented an extremely broad conception of the rule, which encompasses (among other possibilities) any instance where the government retains any discretion to create exceptions under otherwise generally applicable laws, such as a "good cause" standard for prohibited individual conduct.[28] Under such a broad formulation, the Court functionally decided that "no such [generally applicable] law exists,"[29] meaning that "a single exemption to any law necessitates every religious exemption to that same law."[30] The concurring opinions also hinted that the Court's free exercise jurisprudence may continue to race in this direction: Justices Alito, Thomas, and Gorsuch would have overturned *Smith* altogether.[31]

Incidentally, this sweeping conception of the Free Exercise Clause has proven no more helpful to tribes asserting their own rights to religious freedom than RFRA. The *Apache Stronghold* plaintiffs brought a Free Exercise Clause claim as well.[32] The fatal problem here is that, technically, the transfer of Oak Flat is "perfectly universal"[33] in the way recent decisions have held the Free Exercise Clause to require. Even though the Apache tribes will be uniquely burdened, there was no specific "intent to infringe" on their religious practice,[34] and the transfer will equally prohibit any secular activity from taking place on the site without leaving room for exceptions.[35] By the Court's current standards, because by definition there can be no discretion

[26] *Fulton*, 141 S. Ct. at 1877.
[27] *Id.*
[28] *Id.*
[29] ANDREW L. SEIDEL, American Crusade: How the Supreme Court Is Weaponizing Religious Freedom 233, 1st ed. 2022.
[30] *Id.* at 170.
[31] *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).
[32] Complaint at 26, *Apache Stronghold*, 519 F.Supp.3d 591 (No. 2:21-CV-00050-SPL).
[33] Seidel, *supra*, at 169.
[34] *Apache Stronghold*, 38 F.4th at 770.
[35] *Id.* at 771.

to create exceptions to a comprehensive transfer of land the government owns, there would essentially be no way for a government action of this kind to violate the Free Exercise Clause, even if a minority religion is singularly and devastatingly affected. This fundamental legal mismatch highlights another way in which modern free exercise jurisprudence privileges Christians to an extreme degree while leaving members of other religions to suffer the consequences of government disregard.

The justices' individual views on the significance of free exercise protections support this idea that the current conservative majority, which has been characterized as "leading a Christian conservative revolution,"[36] will likely continue to bolster them — at least for Christian challengers. In a 2020 address at the Federalist Society's National Convention, Justice Alito complained that "religious liberty is fast becoming a disfavored right,"[37] a sentiment loudly echoed in his call to overrule *Smith* shortly thereafter.[38] Justice Thomas has spoken openly about allowing Catholic doctrine to guide his actions in what he admits is a "secular job."[39] Prior to his appointment to the Court, Chief Justice Roberts argued that separation of church and state is inherently hostile to religion and advocated for imposing Christian prayers upon children in public schools.[40] The three Trump appointees have taken even more extreme positions. Upon Justice Barrett's nomination to the Court, the Baptist Joint Committee for Religious Liberty raised concerns about her commentary that law is "but a means to an end… [of] building the

[36] Ian Millhiser, *The Supreme Court is leading a Christian conservative revolution*, WASHINGTON POST (Jan. 30, 2022), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett.
[37] Kalvis Golde, *At Federalist Society convention, Alito says religious liberty, gun ownership are under attack*, SCOTUSBLOG (Nov. 30, 2022), https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/.
[38] *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).
[39] Seidel, *supra*, at 210.
[40] *Id.* at 30-32.

kingdom of God."[41] Justice Kavanaugh has praised the late Chief Justice Rehnquist specifically for "helping to dismantle the idea that 'a strict wall' separates church and state."[42] Meanwhile, Justice Gorsuch "has never voted to deny any religiously based claim."[43] The recent trends of the Court, then, are hardly surprising.

The Court's most recent decision substantively addressing the substantial burden standard took place in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), with Justice Alito's majority opinion providing some insight into where the Court's RFRA jurisprudence may be heading and making the *Apache Stronghold* decision even more jarring in light of how much the Court deferred to religious beliefs here. In *Hobby Lobby*, the Court considered the Patient Protection and Affordable Care Act's requirement that certain employees provide minimum health insurance coverage, including contraception coverage, to their employers or face a fine of $100 per day per affected individual.[44] The majority held that because the owners of Hobby Lobby Stores believed both that a fetus is a human and that they had to run their business according to Christian principles,[45] the contraceptive mandate and threat of a financial penalty substantially burdened their religious free exercise.[46] Unlike the Resolution Copper project, the government's actions here did not impose any physical barriers to the owners' religious practices, and they certainly did not make continuing their Christian worship impossible; instead, the law merely imposed a secular financial requirement as part of a broader economic regulatory scheme that

[41] Amanda Tyler, Holly Hollman, & Jennifer Hawks, *Letter to the Senate Judiciary Committee*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Oct. 12, 2022), https://bjconline.org/wp-content/uploads/2020/10/BJC-on-Judge-Amy-Coney-Barretts-church-state-record.pdf.
[42] Laura Meckler, *Kavanaugh record suggests he would favor religious interests in school debates*, WASHINGTON POST (Jul. 10, 2018), https://www.washingtonpost.com/local/education/kavanaugh-record-suggests-he-would-favor-religious-interests-in-school-debates/2018/07/10/a805323c-8475-11e8-8f6c-46cb43e3f306_story.html.
[43] Andrew Koppelman, *Religion and Samuel Alito's time bomb*, THE HILL (Sept. 11, 2022), https://thehill.com/opinion/judiciary/3637154-religion-and-samuel-alitos-time-bomb/.
[44] *Hobby Lobby*, 573 U.S. at 696.
[45] *Id.* at 703.
[46] *Id.* at 727.

would apply widely to many other groups.[47] But the Court rejected the argument that the connection between the threat of a fine and religious freedom was "too attenuated"[48] because the regulation implicated sincere Christian beliefs.[49] Sincere belief was enough to save Hobby Lobby's pockets — but not Oak Flat's existence.[50]

Although many of the Court's more recent free exercise cases have been Free Exercise Clause challenges brought against states, they provide additional insight into how strongly the Court values free exercise — at least for Christians — even though their doctrinal significance lies outside the bounds of RFRA. During the height of the COVID-19 pandemic, the Court in a per curiam opinion struck down state restrictions on in-person church gatherings, reasoning in part that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[51] The Court also recently held that a public high school's attempt to prevent an employee from leading public prayers after football games impermissibly attempted to "treat religious expression as second-class speech,"[52] despite evidence that his team's players felt pressure to join the prayers or risk losing playing time.[53] Finally, the Court struck down a state's decision to exclude religious schools from its tuition assistance program,[54] effectively requiring states to fund religious education. The Ninth Circuit's assertion in *Apache Stronghold* that "the government makes exercises of religion more difficult all the time"[55] seems to stand on feeble footing when Christian practices are threatened.

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[47] *Id.* at 696-99.
[48] *Id.* at 725.
[49] *Id.* at 727.
[50] *Apache Stronghold*, 38 F.4th at 752.
[51] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).
[52] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022).
[53] *Kennedy*, 142 S. Ct. at 2443 (Sotomayor, J., dissenting).
[54] *See* Carson v. Makin, 142 S. Ct. 458 (2021).
[55] *Apache Stronghold*, 38 F.4th at 757.